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**The case for abolishing jury trials in the English legal system
An analysis of the issues and consequences**

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The PhD Thesis

**The case for abolishing jury trials in the
English legal system:
an analysis of the issues and consequences**

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Abstract

This thesis gives a critical study of the fairness and efficiency of the jury trial in the contemporary English justice system. It analyses the various pressures on the English criminal jury system, and attempts to justify the possible abolition of the criminal jury trials in England and Wales, hereafter referred to as 'England' for the sake of convenience.

Firstly, it considers the origin, functions and theoretical basis of the existing English jury system, including the widespread perception of it being a constitutional mechanism designed to involve citizens in the delivery of justice and the implementation of criminal law. It considers the steady reduction in the number of jury trials in recent decades and the introduction of judge-only trials. Comparisons between jury trials in the Crown Courts and summary trials in magistrates' courts are drawn, highlighting the advantages and disadvantages of each, referring to empirical and sociological data.

Secondly, it underlines weaknesses in the jury process stems from obstacles to fair trials, particularly: jury tampering, confusion in complex fraud cases and incidences of contempt of court committed by jurors resulting from their use of the Internet and social media; and draws on selected legal cases, the perceived quality of jury decision-making, the avoidance of institutional prejudice, and issues surrounding public confidence.

Finally, it will present a number of recommendations for English jury reform, including the new Criminal Justice and Courts Act 2015, and explores the possibility of the abolition of the English criminal jury system and proposes the use of alternative models of criminal trial.

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Preface

The jury system has long been regarded as one of the pillars of the English common law system.¹ Historically, ordinary English ‘lay’ people have worked as ‘determiners of fact’ in a criminal trial to achieve fairness and justice. Today most citizens of England are eligible for jury service.² In addition, there are statistics which have shown that more than 80 per cent of British citizens support the jury system.³ Lord Patrick Devlin praised and expressed the jury as “the lamp that shows that freedom lives.”⁴ The previous Attorney General, Dominic Grieve MP, states that “The jury system is an essential element of the justice system of England and Wales. It is deeply ingrained in our national DNA.”⁵ In his opinion, the experience of legal professionals familiar with the English jury system is “overwhelmingly that juries almost always do a conscientious job and do it effectively.”⁶

Some people have criticised the jury system and rejected the notion that it functions as an idealist justice system. For example, it has been described as an

¹ In this thesis, when ‘the English jury system’ is used, it means the jury system of England and Wales.

² See Robin White, ‘Lawyers and the Courts’ in Robert Blackburn (ed), *Rights of Citizenship* (Mansell Publishing Ltd, 1994) 245

³ See Cheryl Thomas, *Diversity and Fairness in the Jury System* (1st edition, Ministry of Justice, 2007) 3

⁴ Patrick Devlin, *Trial by Jury* (6th edition, Stevens & Sons Limited, 1978) 164

⁵ Dominic Grieve, ‘Speech on the jury system and the challenges it faces, given as part of Politeia’s justice series’ (2013)

<<https://www.gov.uk/government/speeches/in-defence-of-the-jury-trial>> accessed 3 March 2015, 1; Grieve continues, “Trial by jury provides a vital safeguard in a free society.” The protection of historic freedoms through the defence of trial by jury was part of the current coalition Government’s agreement when it was launched in 2010. See Prime Minister’s Office, ‘The Coalition: our programme for Government’ (2010) HM Government <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf> accessed 8 March 2015, 11

⁶ Ibid 3

“irrational, costly, and cumbersome institution which demands that ordinary people, with all their frailties of inattentiveness, ignorance, and prejudice pronounce upon sometimes extraordinary complex and consequential matters.”⁷

In addition, from as far back as the middle of the nineteenth century, and all the way up until the recent past, especially the past three decades, the use of the jury system in England has very gradually declined. The system is beset by various and considerable difficulties and pressures. Juror misconduct involving the use of the Internet and social media has undermined the credibility of the English jury system, while the judiciary has not been able to monitor misbehaving jurors’ actions thoroughly enough. Further juror misconduct includes revealing information on jury deliberations and private research which leads juries to deliberate on facts not presented during the trial. Some influential critics forecast limiting the use and even the abolition of jury trials for certain types of criminal offence as it is both possible and reasonable.⁸ If we maintain that the jury system is one of the basic constitutional rights and duties for English people, how, and by what means, will it be possible to limit its usage when it is such an established judicial system? Are there preferable alternatives for the criminal justice system? Have English people begun to question the role of the jury in modern society? Will the use of jury trials be further reduced in the future? Could the system even be abandoned one day?

⁷ Neil Vidmar (ed), *World Jury systems* (Oxford University Press, 2003) General Editor’s Introduction

⁸ For the most recent example, the Lord Chief Justice Thomas proposes limiting the right to trial by jury in various minor offences and complex fraud cases. See Frances Gibb and Sean O’Neill, ‘Lord Chief Justice condemns creeping secrecy in trials’ *The Times* (London, 5 March 2014) <<http://www.thetimes.co.uk/tto/law/article4266214.ece>> accessed 8 March 2015

This thesis gives a critical study of the fairness and efficiency of the jury trial in the contemporary English justice system. It researches the defects of the English criminal jury system to show that the quality of an English jury as a judicial decision-making body has lessened, and the right to a fair trial is under significant pressure, therefore suggesting a move towards radical reform.

To achieve this purpose, this thesis applies a doctrinal research methodology to empirical statistics from the Government and the judiciary. The thesis frequently compares an English jury trial with different criminal justice systems in England, including magistrates' courts, and also with other judicial systems of contrasting countries.

In the first part, this thesis considers the origin, functions and theoretical basis of the existing English jury system, including the widespread perception of it being a constitutional mechanism for involving citizens in the delivery of justice and assisting in the implementation of criminal law. It analyses the steady reduction in the number of jury trials in recent decades and the introduction of judge-only trials. The thesis compares jury trials in the Crown Court with summary and 'triable either-way' trials in the magistrates' courts, focusing on the differences in their roles in a criminal trial and the necessity for legal training; thereby highlighting the advantages and disadvantages of each by referring to empirical and sociological data. The thesis also introduces several theories about the English jury by prominent legal theorists, researchers and judges for the purpose of contrasting different perceptions on the English jury trial as a traditional,

efficient and fair criminal justice system. This section includes theories about the English jury system by Blackstone, Bentham, Thompson, Devlin, Sargant, Darbyshire, Thomas and Blom-Cooper. This thesis will point out that there is little diversity in theories of the jury specialists in English Academia; they tend to lead their research conclusions in the same direction of maintaining the traditional English jury system because most of them are strong proponents of it. This thesis will question those theoretical authorities on jury research, especially Cheryl Thomas's empirical research.

In the second part, the thesis analyses the role of a jury and its misconduct, examining perceived quality of jury decision-making, the avoidance of institutional prejudice, and public confidence. The thesis will point out the existence of the weakness of a jury. In this section, it will discuss jury nullification ('jury equity' in other words) and consider whether it has a necessary 'constitutional right' in the current English society.

Also in this part, it continues to introduce practical weaknesses of the jury process highlighted by obstacles to fair trials, particularly: jury tampering, confusion in complex fraud cases, and contempt of court committed by jurors' use of the Internet and social media, drawing on selected legal cases. In this section, it will compare the pressure on the English jury system with several jury matters in different areas: for example, Diplock Courts in Northern Ireland from 1993 to 2007 and current American, Australian and New Zealand's restriction on juror's use of the Internet and social media. The purpose of the comparison is

to evaluate clearly whether recent newly introduced restrictions on the English jury system would be peculiar ones among Common law countries, and whether they are really inappropriate and might possibly destroy the traditional virtues of the jury system: fairness and efficiency. In the last part of the section, the thesis will present the most current English reform which was introduced to solve the contemporary pressure on the jury: the enforcement of the new Criminal Justice and Courts Act 2015 this February, and discuss its possible advantages and disadvantages.

Finally, this thesis will present a number of recommendations for English jury reform after the enforcement of the Criminal Justice and Courts Act 2015, and explore the possibility of the abolition of the English criminal jury system. In addition, the thesis proposes the use of alternative models of criminal trial: specifically, the magistrates' court model, judge-only trial or continental 'mixed jury.' In addition, it will examine whether the alternative criminal justice system instead of trial by jury will change the English traditional adversarial system to the continental inquisitorial criminal justice system, looking at the resumption of jury system and its difficulty in Spain.

Through the whole of this PhD thesis, it will consider 'lay element' as the decisive reason for the long-lived English jury system. Referring to contemporary criminal cases and the increase in risks of perverse jury deliberations and miscarriages of justice by a jury, this thesis predicts that the abolition of criminal jury will be a possible and realistic option in England. It

will also reject the possibility of the abolition of the lay element in an English criminal trial. Among the alternative trial models which the thesis will suggest, lay magistrate would be an appropriate one which remains as a lay element in an English criminal trial as well as a jury trial. This thesis will conclude this is the most reasonable solution for the Government and the judiciary to achieve fair and efficient criminal trials and avoid extinguishing the lamp that shows that freedom lives in England.

Part 1: The existing English jury system

1. The law and workings of juries in the English legal system

1.) Historical account of judicial participation in England

a.) History of the English jury

As E.P. Thompson stated that “The jury is a very ancient creature, almost as old as the Monarchy and as old as Parliament.”¹ Parliament assumed no part in creating the jury system which historically grew up “silently and gradually”² in the English judicial system. The word ‘jury’ originally means a ‘sworn body’ in Latin (*jurata*).³ There are two major theories about the origin of the English jury system. The predominant view argued that the jury system was born in Francia, and after the Norman conquest of England in 1066, and it was brought to England from the Continent.⁴ Another theory suggested that the English jury had already surfaced before the Norman Conquest, as an Anglo-Saxon system around the tenth century under the reign of King Ethelred II.⁵

The system was developed during the reign of King Henry II in the twelfth century. In that age, the origin of the civil jury which was called an ‘assize’ and a grand jury, was created. Jurors were then a “group of local individuals under oath to tell the truth.”⁶ Thus it could be suggested that jurors in that age were

¹ E.P. Thompson, ‘Subduing the Jury’ (1986) 8(21) London Review of Books 7, 8

² William Forsyth, *History of Trial by Jury* (2nd edition, Burt Franklin, 1971) 1-2

³ See *Halsbury’s Laws of England* (5th edition, LexisNexis, 2010) 61, 673

⁴ For example, see Sally Lloyd-Bostock and Cheryl Thomas, ‘Decline of the ‘Little parliament’’ (1999) 62(2) Law and Contemporary Problems 7, 8

⁵ See Forsyth (n 2) 45-77

⁶ Sally Lloyd-Bostock and Cheryl Thomas, ‘The Continuing Decline of the English Jury’ in Neil Vidmar (ed), *World Jury systems* (Reprinted edition, Oxford University Press, 2003)

“simply witnesses.”⁷ Now, by contrast, they are the examiners of facts. The Great Charter, ‘Magna Carta’ in 1215 mentioned English juries. Article 39 of Magna Carta stated that every free man shall be heard under the lawful judgment of his peers or by the law of the land.

From the sixteenth century to the end of the seventeenth century, the role of a jury gradually changed “from that of witness to that of adjudicator.”⁸ One symbolic case that showed the new character of a jury is *R v Bushell* in 1670.⁹ In this case, the jurors did not convict two Quakers, William Penn and William Mead, as guilty of seditious assembly. The judgment was against the direction by the judge, and the jurors, including Edward Bushell, the jury foreman, were confined to jails without any food, water, or fire for two nights until the Lord Chief Justice approved their release.¹⁰ The case established the principle that “the jury had the right to give a verdict according to its conscience”¹¹ and “could not be penalised for taking a view of the facts which was at odds with that of the judge.”¹² In effect, the *R v Bushell* created the modern role of a jury.¹³

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⁷ Michael McHugh, ‘Juror’s Deliberations, Jury Secrecy, Public Policy and the Law of Contempt’ in Mark Findley and Peter Duff (ed), *The Jury under Attack* (1st edition, Butterworths, 1988) 56

⁸ Ibid 57

⁹ *R v Bushell* [1670] Vaughan 135, 124 Eng Rep 1006 (CP 1670)

¹⁰ See Lloyd-Bostock and Thomas (n 6) 55

¹¹ Stephen Bailey, Jane Ching and Nick Taylor, *The Modern English Legal System* (5th edition, Sweet & Maxwell, 2007) 1074

¹² Lloyd-Bostock and Thomas (n 6) 55

¹³ The previous Attorney General, Dominic Grieve MP, illustrates *R v Bushell* confirmed “the principle of juries’ independence that we value so greatly and which provides an essential guarantor of freedom.” See Dominic Grieve, ‘Speech on the jury system and the challenges it faces, given as part of Politeia’s justice series’ (2013) <<https://www.gov.uk/government/speeches/in-defence-of-the-jury-trial>> accessed 8 March 2015, 2

In the Bill of Rights 1688, the right to criminal trial by jury was clearly noted in a statutory form for the first time in the English history.¹⁴ As McEldowney suggested, “Jury service has now become a citizen’s right as well as his duty.”¹⁵

The second half of the nineteenth century was the age that started to see a decline of various jury systems in England. Since the system of preliminary examination had developed, the grand jury in England was abolished by the Administration of Justice (Miscellaneous Provisions) Act 1933 and the Criminal Justice Act 1948.

Nowadays, a jury is used in three categories of the English judicial procedures: the criminal process, the civil process, and the coronial process in coroners’ inquests. The number of English civil jury trials has been gradually declining since the middle of the nineteenth century when judges were approved to have the right to refuse trial by jury.¹⁶ Recently, the percentage of civil jury trials approximates less than one percent.¹⁷ According to Darbyshire, the most significant reason for this decline of the English civil jury is “inconsistent and exorbitant damages awards.”¹⁸

¹⁴ Bill of Rights 1688 stated that “And whereas of late yeares Partiall Corrupt and Unqualified Persons have beene returned and served on Juryes in Tryalls and particularly diverse Jurors in Tryalls for High Treason which were not Freeholders.”

¹⁵ John McEldowney, ‘Stand By For The Crown: An Historical Analysis’ (1979) *Criminal Law Review* 272, 272

¹⁶ See Lloyd-Bostock and Thomas (n 4) 13

¹⁷ Ibid

¹⁸ Penny Darbyshire, *Darbyshire on the English Legal System* (10th edition, Sweet & Maxwell, 2011) 544

The Coroners Amendment Act 1926 permitted a coroner to sit without a jury in almost all cases. Since this reform, a coroner has never organised an inquest with a jury unless there is a necessity.¹⁹ Around 96 per cent of contemporary coroners' inquests are held without juries.²⁰ However, a coroner's jury still sits where there has been a sudden death, a death which occurred in custody, or involves the conduct of the police.²¹ A coroner's jury gives a verdict on the cause of death after hearing a case. In certain cases, a jury gives reasons for their verdicts. A recent high-ranking example of the coroner jury trial is the Hillsborough disaster 're-inquest.'

b.) History of the English magistrates

The history of English magistrates started in 1195, when Richard I commissioned certain knights to ensure the peace in unruly areas.²² They were called 'Keepers of the King's Peace.' An Act in 1327 regulated good and lawful men to be appointed in every county to preserve the peace and developed the role of lay magistrates as 'justices of the peace.'²³ They functioned as a judicial unit when they heard serious offence cases, as police, and as local executives by the eighteenth century.²⁴ In the sixteenth and seventeenth century, the justices

¹⁹ See Nicholas Blake, 'The Case for the Jury' in Mark Findlay and Peter Duff (ed), *The Jury Under Attack* (1st edition, Butterworths, 1988) 151

²⁰ See Gary Slapper, *How the Law Works* (3rd edition, Routledge, 2014) 190

²¹ See Lloyd-Bostock and Thomas (n 6) 59

²² See Slapper (n 20) 55

²³ The title Justices of Peace derives from 1361, in the reign of Edward III. See Slapper (n 20) 55

²⁴ See Thomas Skyrme, *The Changing Image of the Magistracy* (2nd edition, Macmillan, 1983) 2; John Sprack, *A Practical Approach to Criminal Procedure* (14th edition, Oxford University Press, 2012) 9

of the peace were a group of the gentry.²⁵ They were an influential class of men in the country, who also served as members of Parliament and administered their local area's Quarter Sessions. From the late eighteenth century, the Government appointed stipendiary magistrates for a case in London and some other areas when the lay magistrates were not able to hear efficiently. However, vast amount of magisterial work was the role of lay people: justices of the peace. In the nineteenth century, justices of the peace lost their police and local Governmental functions. This was not because they worked inefficiently; rather, their institution was antiquated, so that it gave way to "a more democratic system of popular election."²⁶ After the Petty Sessions Act 1849 was enacted, magistrates mainly sat on summary jurisdiction. Thereafter, summary jurisdiction increased a great deal and magistrates have conducted an overwhelming majority of criminal cases. In addition, since 1925, a large number of cases that were formerly tried only by a jury have been brought within the jurisdiction of magistrates.²⁷ The Justices of the Peace Act 1949 substituted the word "magistrates' courts" and the definition of magistrates.

2.) Contemporary English criminal courts procedure

Trial by jury in England is not clearly codified by any articles of any constitutional statutes, unlike the Constitution of the United States of America.²⁸

²⁵ See Skyrme (n 24) 3

²⁶ Ibid 4

²⁷ Ibid 5

²⁸ See Article 3, and the fifth, sixth and seventh Amendments to the Constitution of the United States of America

As Lord Devlin suggested, “The jury system is the creation of the judges. Statutes have touched it only on the fringe.”²⁹ Lloyd-Bostock and Thomas have pointed out that, it is easy to change the nature and extent of the right to trial by jury, because it is governed by an ordinary statute which can be altered by a simple Parliamentary Act.³⁰ The prime statute that regulates the contemporary English jury system is the Juries Act 1974.

In England, a jury is composed of twelve jurors.³¹ England does not have a system of alternate jurors who attend the trial and are ready to take the place of discharged jurors. A trial will be continued as long as the number of jurors does not fall below nine.³²

The Lord Chancellor is responsible for the juror summoning and the distribution of business in the Crown Court.³³ Every year, around 400,000 people are called for jury service.³⁴ If a person did not attend following a summons, it may constitute contempt of the court, and breach of the Section 20 of the Juries Act 1974.³⁵

²⁹ Patrick Devlin, *The Judge* (1st edition, Oxford University Press, 1979) 117

³⁰ See Lloyd-Bostock and Thomas (n 4) 10-11

³¹ Auld stated that this number of jurors was “a matter of tradition rather than logic.” See Robin Auld, *A Review of the Criminal Courts of England and Wales* (2001) Ministry of Justice 142 (The so-called *Auld Report*)

³² See Section 16(1) of the Juries Act 1974

³³ The Government departments which are concerned with jury reform are the Lord Chancellors’ Department and the Home Office. Generally, the Lord Chancellor has responsibility for the administration of justice and the Home Secretary has responsibility for the penal system. See Lloyd-Bostock and Thomas (n 6) 57

³⁴ See Malcom Davies, Hazel Croall, and Jane Tyrer, *Criminal Justice* (4th edition, Pearson Education Limited, 2010) 312

³⁵ Surprisingly, according to the empirical research by Darbyshire et al., five-sixths of summoned people for jury service in London avoided or evaded the duty. Darbyshire argues that, this tendency will distort jury representativeness and lead the English jury

The Juries Act 1974 stated that the qualification to serve as a juror.³⁶ Every person will be qualified to be a juror if he or she is for the time being registered as a Parliamentary or Local Government elector and is aged under eighteen nor over seventy six;³⁷ and he or she has been ordinarily resident in the United Kingdom, the Channel Islands or the Isle of Man for any period of at least five years since attaining the age of thirteen. A mentally disabled person and a person disqualified for jury service are exempted from jury service.³⁸ Since the enactment of the Section 68 of the Criminal Justice and Courts Act 2015, the only jury disqualifications would be for people in hospital, subject to recall to hospital, subject to a community treatment order as a result of a mental health condition, and people on bail or who have received certain criminal sentences.³⁹

A jury generally tries only one case. Jurors are randomly and electronically selected by the Jury Central Summoning Bureau from the electoral roll, and finally by an open ballot in the court.⁴⁰ According to McGowan, the reason for the random jury selection could be that it contributes to assure the jury

system to disrepute. See Penny Darbyshire, 'Part D: conclusions and recommendations' in Penny Darbyshire, Andy Maughan and Angus Stewart, *What can the English legal system learn from jury research published up to 2001?: Research Papers in Law* (1st edition, Kingston University, 2002) 64

³⁶ See Section 1(1)(a)(b) and Schedule 1 of the Juries Act 1974 and Section 68 of the Criminal Justice and Courts Act 2015

³⁷ The reason for the amendment to upper age limit for jury service to be 75 year-old by Section 68 of the 'brand-new' Criminal Justice and Courts Act 2015 was to "reflect changes in life expectancy and disability free life expectancy." See House of Lords, 'Explanatory Notes: Criminal Justice and Courts Bill' (2014) 14

³⁸ See Schedule 1 of the Juries Act 1974 and Schedule 33 of the Criminal Justice Act 2003

³⁹ See House of Lords (n 37)

⁴⁰ See Section 11(1) of the Juries Act 1974

representativeness of the English citizens.⁴¹ The Jury Central Summoning Bureau also checks whether individuals have a criminal record.⁴²

It is preferable if the composition of a jury has diversity, however, there is no duty for a judge to adjust an ethnic and racial composition.⁴³ A judge has the power to discharge a jury.⁴⁴ Juries usually reach their verdicts according to Thomas's empirical research.⁴⁵ A judge cannot interfere with a jury's composition.⁴⁶ Where a person does not possess the necessary qualifications, and/or has obvious prejudice or has acted improperly against the defendant and parties, he or she will be challenged.⁴⁷

The jury service has been frequently described as a significant public duty.⁴⁸ As it was mentioned above, if someone tries to reject this compulsory duty without any appropriate reasons, he or she will need to pay the fine.⁴⁹ The Criminal Justice Act 2003 eliminates various previous excusals and it has been more difficult for an English citizen to reject jury duty. Darbyshire states that one in

⁴¹ See Laura McGowan, 'Trial by Jury: Still a Lamp in the Dark?' (2005) 69 *Journal of Criminal Law* 518, 526

⁴² See Davies et al. (n 34)

⁴³ See *R v Ford* [1989] QB 868, 89 Cr App Rep 278, CA

⁴⁴ In a criminal case, the Court of Appeal does not have the jurisdiction to hear an appeal against the discharge of a jury. See Gary Slapper, '10 Remarkable jury cases' *The Times* (London, 30 January 2014)

⁴⁵ See Cheryl Thomas, *Are Juries Fair?* (1st edition, Ministry of Justice Research Series 1/10, 2010) 27. According to her, "89 per cent of charges initially presented to a sworn jury were decided by jury deliberation. Those juries that have been sworn but do not deliberate are ones directed to reach a verdict by the judge (11 per cent) or are the rare juries that have to be discharged before reaching a verdict (less than 1 per cent.)" Thomas has used these rates as an evidence to insist the English jury system is efficient. Ibid 28

⁴⁶ See Michael Zander, *Cases and Materials on the English Legal System* (10th edition, Cambridge University Press, 2007) 492

⁴⁷ See Section 12(4) and (6) of the Juries Act 1974

⁴⁸ See Bailey et al. (n 11)

⁴⁹ See Section 20 of the Juries Act 1974

six of the English citizens has an opportunity of being summoned as a juror in his or her eligible life.⁵⁰

Darbyshire also suggests that the possibility of becoming a juror is decreasing. According to her, one of the possible reasons for this is because of the Criminal Justice Act 2003 which limited the qualification of trial by jury more than ever.⁵¹

Section 118(1) of the Criminal Justice Act 1988 eliminated peremptory challenges; however, the prosecutor uses a 'stand by' (or 'stand aside') procedure which functions in the same way as peremptory challenges. The stand by procedure permits a prosecutor to assign a juror to the back of the prospective jurors list, by the time that all other jurors' examinations have been finished.

After the examination, the individual on the back will only be recalled if there is a juror who cannot be seated. A stand by procedure is applied when the individual has a previous criminal record or assumes to be prejudiced against the case.⁵² However, the prosecution cannot exercise its right for the purpose of influencing the jury composition or its tactical advantages in a trial.⁵³ The Attorney General issued the guidelines to prosecutors on their use of the right of

⁵⁰ See Darbyshire (n 18)

⁵¹ Ibid

⁵² See Joel Lieberman and Jodie Olson, 'The Psychology of Jury Selection' in Joel Lieberman and Daniel Krauss (ed), *Jury Psychology: Social Aspects of Trial Processes* (1st edition, Ashgate, 2009) 100

⁵³ See Attorney General's Office, 'Jury vetting: right of stand by guidelines' (2012) <<https://www.gov.uk/jury-vetting-right-of-stand-by-guidelines--2>> accessed 8 March 2015

stand by in 1989 and amended partly on jury checks in 2012 to achieve the proper administration of justice.⁵⁴ The amended guidelines have limited a prosecutor's use of the right of stand by to only the criminal trials on the national security or terrorism.⁵⁵ In addition, the guideline made clear that the authority to use this power is limited to the Attorney General.⁵⁶

3.) Comparison the Crown Court and magistrates' courts

a.) The Crown Court

Jury trials account for only one per cent of all the English criminal trials.⁵⁷ The criminal trials with jury take place only in the Crown Court.⁵⁸ In cases where the defendant pleads not guilty for his or her serious criminal offence, juries will be summoned to the Crown Court; these cases are trials on indictment as well as appeals from the magistrates' courts.⁵⁹

England and Wales have approximately 92 Crown Courts within seven circuits.

The High Court judges, circuit judges and part-time recorders preside at the Crown Court where they usually sit and hear serious criminal trials with a jury.⁶⁰

⁵⁴ See Attorney General's Office (n 53)

⁵⁵ Ibid

⁵⁶ Ibid

⁵⁷ See Zander (n 46) 20

⁵⁸ See Andrew Sanders and Richard Young, *Criminal Justice* (3rd edition, Oxford University Press, 2007) 480

⁵⁹ Section 22 and schedule 4 of the Criminal Law Act 1977 regulated that if the damage is less than £200, the trial have to be a trial without jury.

⁶⁰ Which sort of judge hears a trial depends on the seriousness of offences of the trial. The High Court judges sit in the most serious cases coming before the Crown Court. Circuit judges preside over 80 per cent of the Crown Court trials. Recorders deal with approximately 15 per cent of trials in the Crown Court. See Sprack (n 24) 230

Every year, some 6,000 appeals are made from the Crown Court to the Court of Appeal (Criminal division).⁶¹

b.) The magistrates' courts

There are approximately 330 magistrates' courts in England and Wales and around 23,000 lay magistrates, still named as 'justices of the peace.'⁶² They are selected from the local community, are unpaid, work part-time and are trained to develop the essential skills including the court and prison visits. A magistrate that is selected can be any age from eighteen to sixty five.⁶³ There are also 141 professional full-time magistrates with legal certificates which are named the 'District judges' (magistrates' courts.)⁶⁴ They are formerly called stipendiary magistrates. The District judges are paid and usually based in the larger cities.⁶⁵

Three, or at minimum two, lay magistrates usually hear a trial. All the magistrates have equal decision-making powers but only one magistrate speaks as the chairman in the court. Legal experts called justices' clerks always accompany lay magistrates in a trial. Justices' clerks give advice to lay

⁶¹ See Slapper (n 20) 194. Except appeals relating to trial on indictment, all the appeals from the Crown Court will go to the Divisional Court of the Queen's Bench Division.

⁶² See Judiciary of England and Wales, 'Magistrates Court' (2015)
<<http://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/magistrates-court>>
accessed 8 March 2015

⁶³ The retirement age is seventy.

⁶⁴ Among all the District judges, 53 were barristers, and 88 were solicitors in April 2012. See Judiciary of England of Wales, '2012 Judicial Diversity statistics - Gender, Ethnicity, Profession and Age' (2012)
<<http://www.judiciary.gov.uk/wp-content/uploads/2014/05/tribunal-diversity-breakdown-sept12.xls>> accessed 8 March 2015

⁶⁵ According to Sprack, approximately half of the full-time District judges sit in London, and half in the provinces. See Sprack (n 24) 94

magistrates on the legal procedure and practice.⁶⁶ When a District judge hears a trial, he or she sits alone.

Skyrme suggested that, “A lay justice cannot equal the professional skill of a stipendiary [a District judge], but the function of magistrates is largely to decide questions of fact and for this purpose to exercise common sense and sound judgment against a background to knowledge and experience of the world at large.”⁶⁷ To become a magistrate, formal qualifications are not required, however, a magistrate has to “demonstrate common sense, integrity, intelligence and the capacity to act fairly.”⁶⁸ These are why the number of lay magistrates is larger than District judges. Except for the power of District judges to sit alone, there is no distinction of power between lay magistrates and District judges.⁶⁹

c.) The type of cases

A criminal trial is dealt with in either the Crown Court or magistrates’ courts. Almost all cases start in the magistrates’ courts. There are some cases in which the accused has a right to decide whether his or her case is heard in the Crown Court or magistrates’ courts.⁷⁰

⁶⁶ According to Zander, there are not so many justices’ clerks who are qualified lawyers. See Zander (n 46) 32

⁶⁷ Skyrme (n 24) 9

⁶⁸ Department of Constitutional Affairs, ‘National Strategy for the Recruitment of Lay Magistrates’ (2003) <<http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/magist/recruit/magrecruit.htm>> accessed 8 March 2015, 2

⁶⁹ See Sprack (n 24) 95

⁷⁰ See Davies et al. (n 34) 269

The magistrates' courts deal with summary⁷¹ and 'triable either-way' offences.⁷² More serious offences, cases that are labeled as indictable-only offences⁷³ will be heard at the Crown Court.⁷⁴ In 2010, summary offences accounted for 68 per cent, while triable either-way offences accounted for 24 per cent of all the proceedings in the magistrates' courts.

The jurisdiction of the magistrates' courts has grown with indictable-only offences downgraded to triable either-way and triable either-way offences to summary offences from the nineteenth century.⁷⁵ The Criminal Law Act 1977 put criminal damage below £200 into summary offences.⁷⁶ After that, the Criminal Justice Act 1988 included taking and driving a car without the owner's consent and common assault and battery in the summary offence category.⁷⁷ Recently, the magistrates' courts have dealt with over 95 per cent of all criminal cases in England since it is the virtual starting point of all the criminal cases in England.⁷⁸ In 2010, approximately 1.68 million defendants were brought to the

⁷¹ Summary offences are the least serious category of offences. For example, motoring offences and minor assaults.

⁷² Triable either-way offences have a very wide range of medium severity offences. According to Sanders, they include theft, burglary, most cases of interpersonal violence, drugs offences, and most cases of criminal damage. See Andrew Sanders, *Community Justice: Modernising the Magistracy in England and Wales* (1st edition, Institute of Public Policy Research, 2001) 8. Triable either-way offences can be dealt with either at the magistrates' courts or at the Crown Court. In such a case, the defendant can insist to be heard in the Crown Court. Magistrates can also transfer the case to the Crown Court since it is so serious offence.

⁷³ Indictable-only offences are such as murder, manslaughter, rape and robbery.

⁷⁴ In such a case, the magistrates' courts will generally decide whether grant a bail, consider other legal issues, for example, reporting restrictions. After that, the magistrates' courts pass the case on to the Crown Court. See Judiciary of England and Wales (n 62)

⁷⁵ See Zander (n 46) 20

⁷⁶ See Section 22 and Schedule 4 of the Criminal Law Act 1977

⁷⁷ See Section 37 and 38 of the Criminal Justice Act 1988

⁷⁸ See Judiciary of England and Wales (n 62)

magistrates' courts and 180,000 trials were recorded.⁷⁹ Conversely, 152,300 cases were received by the Crown Court and listed around 43,300 trials in 2010.⁸⁰ The rate of defendants who entered a plea (in cases committed or sent for a trial) pleaded guilty in the Crown Court has been increasing over the years from 56 per cent in 2001 to 70 per cent in 2010.⁸¹ This would be one of the significant reasons for the decrease in the number of jury trials in the Crown Court.

If the magistrates' courts find the defendant guilty, magistrates will give a sentence of generally of up to six months' imprisonment for a single offence (twelve months in total), or a fine, generally of up to £5,000.⁸² Recently, Section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 abolished this limit of £5,000 on fines, and there has been no limit to the fine that can be imposed on by magistrates.

If magistrates believe that the offence was very serious and their powers of punishment were inadequate on the case, they will be able to send the case to the Crown Court. This is a case that is exceptional, nevertheless, there are aspects of the offence's seriousness which emerge only after a conviction. In such a situation, the case requires the magistrates to commit to the Crown Court for a sentence.⁸³

⁷⁹ See Ministry of Justice, *Judicial and Court Statistics 2010* (Revised edition, 2011) 2-3

⁸⁰ Ibid 3

⁸¹ Ibid

⁸² See Judiciary of England and Wales (n 62)

⁸³ These are a) where the defendant is revealed as having a record of previous convictions by Section 143(2) of the Criminal Justice Act 2003; b) where the defendant asks for

d.) Role of a jury and a magistrate

There are several roles assumed by the English jury. Firstly, a jury's function is to decide the facts. A jury must decide the facts only based on evidence which was mentioned in a trial. Any judicial discretion by a jury based on any information from outside of the court which was not introduced during the criminal trial must not be employed when considering the verdict. In addition, if a jury cannot conclude that giving the defendant a guilty verdict beyond reasonable doubt, the jury must acquit the defendant. This is the English basic evidential rule and the minimum requirement for a jury to give a guilty verdict to a defendant.⁸⁴ Secondly, a jury assumes the common sense role of a representative of the community.⁸⁵ Vidmar stated that jurors are expected to "provide useful insights regarding contested facts and inject community values of equity and fairness into their decisions."⁸⁶ Securing this fairness is considered the most traditional and ultimate purpose of the English jury system. As Blake indicated, "it is a barometer of public opinion."⁸⁷ Related to this, Vidmar suggested that "juries also create a sense of legitimacy about the legal process."⁸⁸ In addition, the transparency of the legal process will be enhanced.⁸⁹

further offences to be taken into consideration; c) where there are aggravating features about the offence charged, of which the magistrates were not aware when they accepted jurisdiction. See Sprack (n 24) 202

⁸⁴ See *Woolmington v DPP* [1935] UKHL 1

⁸⁵ See Bailey et al. (n 11)

⁸⁶ Neil Vidmar, 'A Historical and Comparative Perspective On the Common Law Jury' in Neil Vidmar (ed), *World Jury systems* (Reprinted edition, Oxford University Press, 2003) 19

⁸⁷ Blake (n 19) 142

⁸⁸ Vidmar (n 86)

⁸⁹ See JUSTICE, the Law Society and the General Council of the Bar, *Preserve The Right To Jury Trials* (2005) 1

This function of the English jury system might be labeled as one of the democratic roles. Thirdly, the jury system has educational effects for the people who become jurors. Through the trial, jurors would recognise what justice is, understand what laws are, and can feel what makes democracy, perhaps.

The role of jury is passive and is simply listening to a case.⁹⁰ Morrison expressed the role of contemporary jurors as “from an institution that originally had the power to determine both law and fact, the modern jury has become a singularly passive animal.”⁹¹ However, this description has not been entirely accurate. A juror would be approved to take notes on a trial although it depends on the judge’s discretion.⁹² Sometimes, a jury will put questions by passing a note of the judge.⁹³ The judge usually warns jurors not to discuss their case among themselves before the jury deliberation.⁹⁴

At the end of a trial, a jury will tell their verdict without giving reasons: simply by saying ‘guilty’ or ‘not guilty.’ The jury will not decide on legal interpretations and the sentences, because it is the role of a trial judge.

⁹⁰ See Zander (n 46) 519 and Lloyd-Bostock and Thomas (n 6) 83

⁹¹ Caren Morrison, ‘Jury 2.0’ (2011) 62(6) *Hastings Law Journal* 1579, 1581

⁹² According to *Crown Court Study*, 70 per cent of jurors were provided pens and paper by court. 40 per cent of jurors stated they took notes and 80 per cent of them found their notes useful. See the Royal Commission on Criminal Justice, *Crown Court Study* (1993) HMSO Research Study No.19, 210-211

⁹³ See Zander (n 46) 519. It is rare for a juror to put questions in a criminal trial. For example, there are statistics which show only 17 per cent of jurors put a question in a criminal trial. See the Royal Commission on Criminal Justice (n 92) 174

⁹⁴ See Zander (n 46) 519

The jury's verdicts had required to be agreed upon unanimously for the most part of the long history of English jury trials. If a jury could not be led into agreement of their verdict, it would become a 'hung jury',⁹⁵ and then different jurors would start the trial again.⁹⁶ However, in the last century, jury tampering has gradually become a serious threat to assuring fairness of a trial,⁹⁷ thus Parliament enacted Section 13 of the Criminal Justice Act 1967. The act abolishes unanimous verdicts in criminal trials, and permits a jury to give majority verdicts. With these new types of verdicts, it could be a judgment when ten out of twelve jurors agreed with the verdict.⁹⁸ However, even though majority verdicts are legitimately permitted, jurors will be required to try for at least two hours in their deliberation to reach a unanimous verdict.⁹⁹ When a jury delivers its verdict, the judge asks the foreman whether the verdict was unanimous, and if not, by what majority.¹⁰⁰ There are statistics showing that 81 per cent of all convicted jury verdicts were unanimous, the remaining 19 per cent were majority verdicts in 2010.¹⁰¹

The role of magistrates is also to decide whether the defendant is guilty or not. In addition, if the defendant is guilty, the magistrates will decide the sentence of him or her. A District judge normally hears when the case is prolonged or more

⁹⁵ Only less than one percent of all the criminal jury deliberated cases were 'hung juries'. They occurred most often in the trial with sexual offences (44 per cent) and assaults (17 per cent.) See Thomas (n 45)

⁹⁶ See Zander (n 46) 532

⁹⁷ See Darbyshire (n 18) 545

⁹⁸ See Section 7 of the Juries Act 1974

⁹⁹ See Section 17(4) of the Juries Act 1974

¹⁰⁰ See Lloyd-Bostock and Thomas (n 6) 86

¹⁰¹ See Ministry of Justice (n 79) 91. Thomas states that "It is difficult to assess when and how often majority verdicts occur because majority verdicts are only recorded for guilty verdicts." See Thomas (n 45) 28

complex, or involves considerations of public safety, public interest immunity applications, and extradition cases.¹⁰²

Unlike jurors, lay magistrates need to take the legal training which is provided by the justice's Clerk, the Magistrates Association and the Judicial College. The website of the Magistrates Association states that the contents of training for lay magistrates.¹⁰³ At the first year of the term, lay magistrates take the training programme including lectures by mentors and visiting penal institutions. After one to one and half years, they will start their magisterial career at court. Lay magistrates are predicted to sit in court at least 26 times per a year.¹⁰⁴

According to Sprack, the average attendance of lay magistrates is approximately 35 times during a year.¹⁰⁵ Lay magistrates need to take an ongoing training programme after that and be examined their quality from time to time.¹⁰⁶

The Law Commission suggests that the training is meaningful to make lay magistrates not to have any prejudice.¹⁰⁷ However, there is a discussion about whether legally trained lay magistrates could be expressed as 'lay people.' For example, Sprack shows his concern that "Through their initial training and through their regular attendance at court, often over many years, lay magistrates become knowledgeable about the work of their courts. Although the adjective 'lay' is used to illustrate them, they are far from being ignorant of the ways of

¹⁰² See Sprack (n 24) 95

¹⁰³ See the Magistrates Association, 'What about training' (2015) The Magistrates Association <<http://www.magistrates-association.org.uk/about-magistrates/training/>> accessed 8 March 2015

¹⁰⁴ See Sprack (n 24) 93

¹⁰⁵ Ibid

¹⁰⁶ For example, after a new legislation passed in Parliament

¹⁰⁷ See the Law Commission, 'Contempt of Court: A Consultation Paper' (2012) Consultation Paper No. 209, 11

the law.”¹⁰⁸ A discussion has developed about what the meaning and merit of a constitutional institution involving lay people in the justice system is in the next section.

¹⁰⁸ Sprack (n 24) 93

2. The theoretical basis of English jury trial: perception of being a constitutional institution involving lay people in the English justice system

Slapper proudly states that “The jury, over 800 years old in Britain, is generally seen as a desirable feature of the British constitution.”¹ Is the jury system actually desirable in contemporary England? According to Cheryl Thomas, more than 80 per cent of British citizens support juries.² However, there is also a certain amount of scepticism about the efficiency of the jury in contemporary England. In this section, I will raise various opinions on the English jury by well-known legal theorists, researchers and judges and introduce their perception of being a constitutional institution involving lay people in the English justice system. Comparing their opinions, theoretical basis of English jury trial will be clearly provided.

1.) William Blackstone and Jeremy Bentham

The contemporary image of the jury system has been created between the sixteenth and seventeenth century. The transformation from witness to a fact finder shows that a juror has been treated as a significant role in the English justice system. William Blackstone, the great legal theorist of the eighteenth century of England, was one of the representative praiser and a supporter of the

¹ Gary Slapper, *How the Law Works* (3rd edition, Routledge, 2014) 183

² See Cheryl Thomas, *Diversity and Fairness in the Jury System* (1st edition, Ministry of Justice, 2007) 3

English jury system. Blackstone stated that “for whom the jury was the most admirably constituted fact-finding body in the world.”³ He highly evaluated the fact-finding body which consisted of lay people as a representative citizen to assure fair trial and justice. Conversely, Blackstone foresaw that a right to trial by jury would gradually be “sapped and undermined”⁴ by the introduction of other convenient methods of trial including justices of the peace. His prophecy was realised in the nineteenth century England.

Unlike Blackstone, Jeremy Bentham, a representative legal scholar in the nineteenth century England, was a critic of the jury system, especially the grand jury system in England.⁵ Bentham was against the English grand jury system.⁶ Bentham was concerned about jurors’ secrecy and sceptical about its representativeness.⁷ He took an opposite view from Blackstone who praised the representative function of juries. Bentham suggested that, “Whatever it may have been at one time, as matters have stood for a long time, a grand jury has been, is, and will be, an instrument worse than useless.”⁸ About a hundred years later from Bentham’s criticism against juries, the grand jury was abolished in England.⁹

³ William Blackstone, *Commentaries on the Laws of England*, Book III, 1769/1996 (Clarendon Edition, 1996) 378-379

⁴ Blackstone (n 3) 343

⁵ See Nathan Elliff, ‘Notes on the Abolition of the English Grand Jury’ (1938) 29(1) *The Journal of Criminal Law and Criminology* 3, 6

⁶ See Elliff (n 5)

⁷ *Ibid* 7

⁸ Jeremy Bentham, *The Works of Jeremy Bentham*, Volume II (1st edition, William Tait, 1843) 139

⁹ The English grand jury was abolished by the Administration of Justice (Miscellaneous Provisions) Act 1933 and the Criminal Justice Act 1948.

2.) E.P. Thompson

E.P. Thompson, a high-ranking socialistic historian in twentieth century England gave comments on the jury system based on his historical analysis. He noted why juries could survive and keep their legitimacy in the modern English legal history was because its social profile has not been changed regardless of the rising new working-class in the English political culture of nineteenth century.¹⁰ In his understanding, “A jury of the middling sort of people, which in 1649 or 1794 still watchfully confronted the ‘Crown,’ now turned itself about and confronted the challenge of democracy from their social inferiors.”¹¹ This view was obviously by his socialistic way off thinking,¹² but his next expression was more persuasive: “Perhaps this may explain why the jury survived into the twentieth century almost immune from the rationalisations imposed by Utilitarians in other areas.”¹³ Actually, the jury system was survived although its demerits and risks have been already pointed out by Bentham.

Thompson analysed the contemporary movement of jury restriction in England was produced by “anti-jury lobby”¹⁴ and sarcastically argued that “After eight hundred years our betters have decided to bring the jury under their condign

¹⁰ See E.P. Thompson, ‘Subduing the Jury’ (1986) 8(21) London Review of Books 7, 9

¹¹ Ibid

¹² Thompson also stated that “the jury’s ancient legitimacy proved to be a useful resource in the control of working-class movements.” Ibid

¹³ Ibid

¹⁴ Ibid

control.”¹⁵ Conversely, Thompson has pointed out the vulnerable aspects of the English jury system correctly as:

*The jury is perhaps the last place in our social organisation where any person, any citizen, may be called upon to perform a fully adult role. It has not been shown that our fellow citizens have failed, when placed in the jury box. They appear, when they find themselves resources to fulfil the responsibility. But the very notion of it is ‘illogical’ and absurd. Only a crank could suggest such a direct exercise of democracy today. Indeed, although as a historian I have to confess that the thing has worked, I can scarcely comprehend it myself.*¹⁶

Thompson took the severe position on the jury qualification. For instance, he stated that “This is not to say that the old system was beyond all possibility of reform. There could be more preparation for our rights and our duties as jurors in our schools.”¹⁷ He continued “It may be argued that eighteen is too young to fulfil the role, that literacy qualifications might be more scrupulous, or even that, for some modern types of case, qualifications might be required in numeracy. And education might go further still.”¹⁸ His concern on the jury qualification of young people has been shared with the contemporary British Government, and it will not change the lower age limit to be a juror. Instead, the Government raised the upper age limit of it as seventy-five.¹⁹

¹⁵ Thompson (n 10)

¹⁶ Ibid 13

¹⁷ Ibid

¹⁸ Ibid

¹⁹ See Section 68 of the Criminal Justice and Courts Act 2015

Conversely, Thompson was not perfectly against the English jury. Thompson stated that:

*The English common law rests upon a bargain between the Law and the people. The jury box is where the people come into the court: the judge watches them and the jury watches back. A jury is the place where the bargain is struck. The jury attends in judgment, not only upon the accused, but also upon the justice and humanity of the Law.*²⁰

In other words, Thompson indicated the jury bargains with a trial judge to achieve the justice by the rule on behalf of the English people. He maintained “For the moment, randomness- and confidence in our fellow citizens- is enough.”²¹

3.) Lord Patrick Devlin

Lord Patrick Devlin was an outstanding judge of the twentieth century England. He wrote several books on the English jury, for example, *Trial by Jury*²² which was the record of his Hamlyn Lectures. Devlin was “generally favourable”²³ for

²⁰ *New Society* (London, 19 October 1978). See also E.P. Thompson, ‘Introduction’ in Harriet Harman and John Griffith, *Justice Deserted: The Subversion of the Jury* (1st edition, National Council for Civil Liberties, 1979) 5

²¹ Thompson (n 10) 13

²² Patrick Devlin, *Trial by Jury* (6th edition, Stevens & Sons Limited, 1978) 164

²³ Glanville Williams, *The Proof of Guilt* (3rd edition, Stevens & Sons Limited, 1963) 280

the jury system. Devlin expressed the jury as a “little parliament.”²⁴ In other words, Devlin thought the jury system is one of the efficient ways to secure democracy. For him, the jury system was “more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.”²⁵ Devlin believed that “The British have a taste for umpiring and feel flattered by having disputes referred to them.”²⁶ He highly praised the lay element of a jury and was against any trial by experts. Devlin stated that:

*To refer a case for decision to a body of experts or even to men and women of superior mental powers would mean that the person accuses might be imprisoned for ten or fifteen years or for life, for reasons which could not be made clear to the average citizen. This is not democracy. This is what trial by jury prevents.*²⁷

For Devlin, “There is no room in the criminal law for the idea that a case could be too complicated for a jury to understand.”²⁸ This theory was followed by the people against the enforcement of Section 43 of the Criminal Justice Act 2003 which introduced a non-jury trial on a case of complex fraud. Moreover, Devlin concerned a non-jury trial leads the decrease of chances of acquittal for a defendant.²⁹ In addition, Devlin thought the jury system had the effect of

²⁴ Devlin (n 22)

²⁵ Ibid

²⁶ Ibid 24

²⁷ Patrick Devlin, ‘Trial by jury for fraud’ (1986) 6(3) Oxford Journal of Legal Studies 311, 313-14

²⁸ Ibid 313

²⁹ Ibid 320

making citizens “a law-abiding people”³⁰ and also “Good guardians of the law and gives them a sense of fairness that makes them happy judges.”³¹ Eventually, as Devlin indicated, “Twelve commonplace minds may reach a sounder solution than two or three brilliant ones.”³²

Through these descriptions, it is obvious that Devlin was a strong supporter for the jury system. Thompson indicated Lord Devlin:

For Alexis de Tocqueville the American jury was an ‘eminently republican element in the Government.’ which ‘places the real direction of Society in the hands of the governed.’ I know of only one old judge, long retired from practice, who even understands this language today. And he- Lord Devlin- now writes in elegiac tone. Thirty years ago he could say that ‘the jury is the lamp that shows that freedom lives’ In 1978, he warned of the gathering signs ‘that the jury has another half-century or so of life to be spent in the sort of comfortable reservation which conquerors, bringing with them a new civilisation, assign to the natives whom they are displacing.’³³

Sometimes, Devlin’s theory such as “intuition and not intellect may be the safer guide”³⁴ was so radical and Thompson’s cynical comments are understandable. However, Devlin did not ignore the fact that a trial by jury is not a perfect

³⁰ Devlin (n 22) 24

³¹ Ibid

³² Devlin (n 27) 315

³³ Thompson (n 10) 13

³⁴ Devlin (n 27) 315

judicial system. For example, he concurred with the theory that trial by jury “has been suspended or withdrawn in certain circumstances.”³⁵ Devlin has pointed out that in some cases the use of jury will be difficult and care will need to be taken about the way the trial proceeding. For instance, in a criminal trial on sexual offences, if there were female jurors, they would probably feel “embarrassment of serving.”³⁶ In such a situation, the judge needs to “relieve women”³⁷ from serving on the jury. For another instance, Devlin was a supporter of the *voir dire* procedure of jury selection. He suggested that “I do not think that it would be objectionable to have an educational qualification recorded on the jury list in the same way as an occupation. Nor do I think that it would be objectionable to use the *voir dire* for the purpose of ensuring as competent a jury as the panel could provide.”³⁸ Devlin correctly understood a long trial sometimes has a negative effect on a juror’s original job and life. He stated that:

*Jury service is a long case can be very burdensome to the jurors and indeed impossible for those who could not give the time without injury to their ordinary employments. I imagine that informally most such people are now excused. I see no reason why they do not have to be exempted in the same way as those in certain professions are exempt from all jury service. A partial exemption from long trials only ought to be workable.*³⁹

³⁵ Devlin (n 27) 314

³⁶ Devlin (n 22) 29-30

³⁷ Ibid

³⁸ Devlin (n 27) 317

³⁹ Ibid

Conversely, Devlin claimed that “Is there any evidence that jury trials have increased disproportionately? Granted that a jury trial of any sort will take a percentage longer than a non-jury trial, is the increase of time taken so large as to be an unacceptable addition?”⁴⁰ Devlin took a neutral position and objectively observed the cost factor of the English jury system in both money and time.

It is clear that Devlin was practical, and was not just a close-sighted advocate of the jury system. Devlin objectively analysed the actuality of modern English society by his judicial career.

4.) Tom Sargent

In the book, *Criminal Trials*, Tom Sargent, the first secretary of JUSTICE and an eminent human rights activist in the twentieth century England, frequently analysed and reported the quality and reliability of the jury verdicts and judgment by magistrates in the English Criminal Courts. For him, “The jury system provides a vital safeguard against oppressive prosecutions but it has some serious weaknesses.”⁴¹ Among the weaknesses of the English jury system, he raised the problem of miscarriages of justice by a jury. Sargent stated that “A dozen or more serious cases in which the verdicts of juries have been manifestly

⁴⁰ Devlin (n 27) 317

⁴¹ Tom Sargent and Peter Hill, *Criminal Trials: The Search for Truth* (1st edition, Fabian Society, 1986) 11

mistaken.”⁴² As the possible reason for this, Sargant illustrated the severe secrecy of jury deliberation. According to him, the ability of a jury to give a verdict appropriately and correctly based on evidence is uncertain since “No one will ever know how often they make tragic mistakes.”⁴³ The factor undermines the credibility of jury and arouses suspicion on fairness of jury trial among English citizens. Sargant claimed “Juries are too often required to bring in their verdicts on the basis of a limited knowledge of the facts— sometimes on what can fairly be described as the tip of the iceberg.”⁴⁴ For example, the limited knowledge of a juror would not understand complex fraud cases correctly.⁴⁵ It would cause miscarriages of justice.

In addition, he showed his concern on the case if a juror told other jurors false and prejudicial information about the defendant.⁴⁶ Sargant suggested his reform plan of the English jury system. For example, Sargant asserted the minimum age of jury, eighteen year-old is too low as Thompson suggested. According to Sargant, “members of juries should have sufficient experience of life to be able to judge character and evaluate objectively.”⁴⁷ Sargant suggested that, twenty-five year-old should be a “sensible minimum age.”⁴⁸ The matureness of each juror is a solution for avoiding perverse verdicts and miscarriages of justice. Sargant also stated that, if the jury verdict was majority of ten to two, the

⁴² Sargant and Hill (n 41) 1

⁴³ Ibid 3

⁴⁴ Ibid 11

⁴⁵ Ibid

⁴⁶ Ibid 11-12

⁴⁷ Ibid 11

⁴⁸ Ibid

defendant would be approved to hold an automatic right to appeal.⁴⁹ This would ease the concern on a majority jury verdict.

Sargant suggested a jury needs to give the reason for the verdicts with the judgment. It makes an much more efficient appeal “particularly when the Court is asked to evaluate the probable effect of new evidence.”⁵⁰ Sargant suggested a jury needs to give some indication of at least what evidence they accepted or rejected.⁵¹

Sargant was a reformer but also a strong supporter of English criminal jury. His theory and positive attitude to suggest his original jury reform plan has been succeeded to JUSTICE, the organisation which he was the secretary.

5.) Penny Darbyshire

Penny Darbyshire and Cheryl Thomas are two well-known contemporary researchers on the English jury system and engage with empirical jury research.

Darbyshire analysed diversity of jurors. Darbyshire and her team researched empirically, and concluded English juries “are unrepresentative of certain groups, notably women and minorities and, possibly, some occupational groups.”⁵² According to her, men tended to be more active in jury deliberation

⁴⁹ See Sargant and Hill (n 41) 12

⁵⁰ Ibid 11

⁵¹ Ibid

⁵² Penny Darbyshire, ‘What can we learn from published jury research? Findings for the

and more likely to be foremen and even more likely acquit than women.⁵³

Darbyshire found “Jurors are more likely to empathise with defendants of their own gender.”⁵⁴ In addition, Darbyshire suggested the age would influence the deliberation process because younger people can recall more instructions and the evidence.⁵⁵ Darbyshire’s theory on the relation between ability of jury and ages was opposite from Thompson and Sargent.

She put a question whether cotemporary jury actually represents English citizens. She maintained “Most people try to avoid jury service,”⁵⁶ and “it must distort jury representativeness.”⁵⁷ Thus the abolition of right of excuse and merging the list of juror summoning from the electoral roll to such as telephone directories would be a solution for the problem.⁵⁸ Her theory connects to the contemporary jury reform by the Government including the abolition of peremptory challenges and expansion of the jury qualification toward more diversified citizens.

Darbyshire thought jury does not have so much significance as Lord Devlin expressed “the lamp that shows that freedom lives”⁵⁹ in the contemporary English society; she stated that “The jury’s symbolic significance is magnified beyond its practical significance by the media, as well as academics, thus

Criminal Courts Review’ (2001) Criminal Law Review 970, 976

⁵³ Ibid 977

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ Ibid 976

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Devlin (n 22)

unwittingly misleading the public.”⁶⁰ Darbyshire argued, in contemporary English society, “The traditional justifications used in praise and defence of the jury, suggesting that some of them are conceptually unsound.”⁶¹ Although her theory seems to be cold for an enthusiastic supporter of jury system, Darbyshire’s analysis is realistic in some aspects. For example, Darbyshire grasped that the rise of magistrates’ courts in contemporary English criminal justice scene. She has pointed out that media and academic have not closed up the importance of the magistracy in the English criminal justice system compare with the jury system.⁶² For another example, Darbyshire suggested that tried for indictable only offences could have the right to opt for judge-only trial.⁶³ In addition, she argued that non-jury criminal trials are adequate for serious and complex fraud trials.⁶⁴ However, these realistic suggestions have not focused comparing with the theory which strongly supports existing English criminal jury by Cheryl Thomas.

6.) Cheryl Thomas

Cheryl Thomas is one of the central experts on the English jury system recently. She is a strong supporter for jury system, has engaged empirical researches on

⁶⁰ Penny Darbyshire, ‘The lamp that shows that freedom lives- is it worth the candle?’ (1991) Criminal Law Review 740, 746

⁶¹ Ibid 750

⁶² See Penny Darbyshire, ‘For the new Lord Chancellor- some causes for concern about magistrates’ (1997) Criminal Law Review 861, 874

⁶³ See Penny Darbyshire, ‘Strengthening the argument in favour of the defendant’s right to elect’ (1997) Criminal Law Review 911, 914

⁶⁴ See Penny Darbyshire, ‘Part D: conclusions and recommendations’ in Penny Darbyshire, Andy Maughan and Angus Stewart, *What can the English legal system learn from jury research published up to 2001?: Research Papers in Law* (1st edition, Kingston University, 2002) 68

English jury, and contributed to preparing the Governmental research on its jury reform.

Thomas's basic thought is to protect the English criminal jury system. For her, criticisms of contemporary criminal jury system are myths. Thomas states that her "survey findings on who does and who does not do jury service at the Crown Courts in England and Wales have revealed that most current thinking about the representative nature of jury service in this country is based on myth, not reality."⁶⁵ For Thomas, people who take "the sky is falling"⁶⁶ theory "would perhaps prefer to see an end to trial by jury, and who have a lack of faith in non-legally trained persons adjudicating criminal cases."⁶⁷ She argues the "let's just blindly trust the jury"⁶⁸ position people as "the blind faith approach suits media outlets in particular who would prefer not to have any restrictions on what they publish."⁶⁹ Thomas maintains:

*It is not just that we must (or must not) 'trust the jury'. It should be that we must give the jury the best tools to do their job to the best of their ability— and then we must trust the jury to do that job. Blind trust in juries is not just misguided; it is not what juries want themselves.*⁷⁰

⁶⁵ Thomas (n 2) 114

⁶⁶ Cheryl Thomas, 'Avoiding the perfect storm of juror contempt' (2013) 6 Criminal Law Review 483, 500

⁶⁷ Ibid

⁶⁸ Ibid 500-501

⁶⁹ Ibid

⁷⁰ Ibid 501

As the Law Commission allows, “Reliable empirical research in England and Wales about the impact of publicity on jury and judicial decision-making is relatively scarce.”⁷¹ Thomas tends to suggest the significance of empirical evidence. For example, she states that “Any reform of the law of contempt in relation to juries and jury trials should be based on rigorous and reliable empirical evidence, not anecdotal evidence, exceptional cases or untested assumptions about juries.”⁷² She continues “Too often proposals for change are based on anecdotal claims about jury problems or single high profile or exceptional cases.”⁷³ However, her empirical research is the main (could be said only the) evidence for her to support her theory, and she is confident of it too much. For instance, according to Thomas, “*Are Juries Fair?* is the most in-depth study into the issue ever undertaken in this country.”⁷⁴ Actually, in this empirical research, Thomas had interviewed post-verdict jurors who were all in Crown Courts in England and Wales from 2006 to 2008. Upon evaluation, it could be argued that this study was a greater research undertaking than one which simply interviewed mock jurors. As another example, about *Diversity and Fairness in the Jury System*, Thomas confidently states that it is “the first empirical study ever undertaken in this country on the influence of race on jury decision-making.”⁷⁵

⁷¹ The Law Commission, ‘Contempt of Court: A Consultation Paper’ (2012) Consultation Paper No. 209, 10

⁷² Thomas (n 66) 483

⁷³ Ibid 495

⁷⁴ Slapper (n 1) 186

⁷⁵ Cheryl Thomas, ‘Exposing the myths of jury service’ (2008) 6 Criminal Law Review 415, 415. Thomas’s overconfidence has decreased the quality and credibility of Thomas’s achievement as it will be discussed below on the topic of contemporary jury reform and contempt of court.

7.) Louis Blom-Cooper

Louis Blom-Cooper, well-known public lawyer in England is sceptical on the efficiency and ability of a jury to achieve a fair trial unlike Cheryl Thomas.

Blom-Cooper stated that “The question of evaluating evidence in the courtroom is a professional job, it’s not for amateurs.”⁷⁶ Blom-Cooper argues Thomas as “While the research into jury trials is welcome, the report by Professor Cheryl Thomas does not answer (not purport to answer) the crucial question: whether our system of trial by jury for serious crimes produces a quality of criminal justice as good, if not better, than would a wholly professional system.”⁷⁷

According to him, “There is nothing illiberal about questioning the value of the jury system of criminal justice. It is more a question of deciding whether trial by judge and jury in the Crown Court for more serious criminal offences is as good if not better than any alternative, such as trial by judge alone, or assessors.”⁷⁸

For him, a non-jury trial needs to be one of the options for a defendant especially in complex fraud cases.⁷⁹ He claimed “Defendants should also have the right to be tried by a panel of experts instead of a jury.”⁸⁰ Blom-Cooper adds as the condition of organising a non-jury trial, court needs to decide the

⁷⁶ Louis Blom-Cooper, ‘Jury trials ‘facing fresh threat’ *BBC News* (London, 16 April 2002)

⁷⁷ Louis Blom-Cooper, ‘Judgment reserved on jury trials’ *the Guardian* (London, 20 February 2010)

⁷⁸ Louis Blom-Cooper, ‘Judge only trials should be an option for serious organised crimes’ *the Guardian* (London, 21 May 2010)

⁷⁹ See Louis Blom-Cooper, ‘Twelve angry men can be wrong’ *the Guardian* (London, 21 October 2001)

⁸⁰ Blom-Cooper (n 76)

question whether a trial is appropriate to be heard without a jury in each case, “even if both parties agreed that they wanted a professional tribunal.”⁸¹

8.) Conclusion for the chapter

Although the English jury system has been vastly accepted in statistics, as the theorists in this chapter provided, there are various perceptions on the efficiency of a jury in England. The advantages and disadvantages of the English criminal jury system will be examined in the next chapter.

⁸¹ Blom-Cooper (n 78)

Part 2: The argument for the weaknesses of the jury process

1. The analysis of the role of a jury and its misconduct

1.) The role of a jury

a.) As a mean of establishing the facts of a case

The main job of a jury is the finding of fact in a trial. Unlike in the Middle Ages, a juror is not a witness. A juror must not decide facts by using their prior knowledge of the case or even concerns raised by the case.¹ If a juror does these actions, it will be a perverse verdict by juror misconduct and it would constitute a legitimate reason for an appeal.² However, could a juror actually figure out facts of a case only based only on the evidence in a trial?

According to Blake, “One of the persistent arguments canvassed against juries is that they are not intelligent enough.”³ Even though the trial is a complex case, a jury needs to sit to hear and decide its verdict. In a complex case, the English judiciary does not have the intention to let experts decide verdicts without a jury at the moment. The English jury sometimes decides cases which would be a matter for experts in the other countries.⁴ In *R v Turner*, it was stated that expert

¹ See Ian Cram, *A Virtue Less Cloistered Courts, Speech and Constitutions* (1st edition, Hart Publishing, 2002) 80

² See Malcom Davies, Hazel Croall, and Jane Tyrer, *Criminal Justice* (4th edition, Pearson Education Limited, 2010) 313

³ Nicholas Blake, ‘The Case for the Jury’ in Mark Findlay and Peter Duff (ed), *The Jury Under Attack* (1st edition, Butterworths, 1988) 152

⁴ The expert evidence from psychologists and psychiatrists has been limited in England more than in the United States. See Sally Lloyd-Bostock and Cheryl Thomas, ‘The Continuing Decline of the English Jury’ in Neil Vidmar (ed), *World Jury systems* (Reprinted edition, Oxford University Press, 2003) 81. They also stated that “While specific rules and practices have become established in relation to some categories of evidence, it is for the individual judge to decide whether expert evidence will be admitted and what comment on it, if any, he or she will make.” Ibid.

evidence is inadmissible if it is “within the common knowledge and experience of jurors.”⁵

b.) As a mean of applying the law: a problem of jury nullification

A jury has only a fact-finding function in a criminal trial. It does not have power to apply the law. Deciding the law in a trial is the prime role of a judge. Before a jury deliberates, a judge tells a jury about the legal direction and advises on the case. The judge will tell the jurors what kind of laws will be applied in this case. However, if the jurors do not follow the judge’s direction and ignore any laws which the judge specifies, what will the judge do? Will the jurors be punished? Will the trial be restarted again? If the jurors have the constitutional rights to ignore any laws, will there be any limits? These topics are in relation to the problem of ‘jury nullification.’ Jury nullification is the ‘right’ of jurors to ignore the law by their consciences. It is also called ‘jury equity.’

Why could ignoring the law be a right of a jury? There is a discussion about whether the constitutional right of nullification actually exists or is permissible for a jury. Darbyshire states that legitimising jury nullification means that the court cannot punish jurors even though their judgment was a perverse verdict and contrary to the judge’s instruction.⁶ Originally, the right to ignore the law was first approved in *R v Bushell* in 1670.⁷ There have been various reasons

⁵ *R v Turner* [1975] QB 834, 841

⁶ See Penny Darbyshire, *Darbyshire on the English Legal System* (10th edition, Sweet & Maxwell, 2011) 551

⁷ *R v Bushell* [1670] Vaughan 135, 124 Eng Rep 1006 (CP 1670)

why jurors ignore the law. For example, there would be jury nullifications against too unreasonable sentences, racism and improper Government action.⁸ The recent case which affirmed jury nullification was *R v Wang* in 2005.⁹ In this case, the House of Lords affirmed that juries can deliver an acquittal even though the judge considered it was a perverse verdict.¹⁰

In addition to these judgments, there have been theories which positively accept the existence of jury nullification. For example, Lloyd-Bostock and Thomas suggested that the right of jury nullification is the jury's main democratic function.¹¹ They stated that it is because the verdict by jury "is a matter entirely between God and their own conscience."¹² Grieve suggests "Do we want a legal system in which the jury can return a verdict which seems to us to fly in the face of the evidence? My answer is yes, it is essential that juries are trusted to take decisions, with proper direction, even if very occasionally those decisions will not accord with the view that lawyers, judges or the Crown may hold."¹³

Conversely, Brooks stated that "properly understood, juries do not have any constitutional *right* to ignore the law, but they do have the *power* to do so

⁸ See Thom Brooks, 'A defence of jury nullification' (2004) 10(4) Res Publica 401, 401-402

⁹ *R v Wang* [2005] UKHL 9

¹⁰ Ibid

¹¹ See Sally Lloyd-Bostock and Cheryl Thomas, 'Decline of the 'Little parliament'' (1999) 62(2) Law and Contemporary Problems 7, 10

¹² Lloyd-Bostock and Thomas (n 4) 87. See also *R v Shipley* [1784] 99 Eng Rep 774, 820-24

¹³ Dominic Grieve, 'Speech on the jury system and the challenges it faces, given as part of Politeia's justice series' (2013) <<https://www.gov.uk/government/speeches/in-defence-of-the-jury-trial>> accessed 8 March 2015, 2

nevertheless.”¹⁴ In other words, his theory is that there is no permission for the jury nor any rights of nullification; however, in fact, they have such power. Actually, jury nullification is not the right nor power to ignore the law itself. As Lloyd-Bostock and Thomas suggested, juries only can nullify in particular case.¹⁵

However, a difficult problem raises in the case that juries just misunderstand the facts and give a decision unlike that directed by judges. As Legal Commission has pointed out that, “There may of course be some jurors who ignore the judge’s direction simply out of curiosity or even in bad faith.”¹⁶ For example, the perverse verdicts because of less understanding in complex trials will be possible.¹⁷ Even if it is misjudged, or without any intention to nullify the law, will jury nullification be legitimate? As Lloyd-Bostock and Thomas have pointed out, there is no clear distinction between jury nullification and miscarriage of justice by jurors who are lack of understanding or prejudiced.¹⁸ This is one of the reasons which people, against legitimate jury nullification give. For example, Singer states that jury nullification is often argued as “anachronistic, inconsistent, threatening anarchy, and a license for unjust acquittals.”¹⁹ Jackson claims that the court must not legitimise a conviction by

¹⁴ Brooks (n 8)

¹⁵ See Lloyd-Bostock and Thomas (n 4) 87

¹⁶ The Law Commission, ‘Contempt of Court: A Consultation Paper’ (2012) Consultation Paper No. 209, 71

¹⁷ See Brooks (n 8) 415

¹⁸ See Lloyd-Bostock and Thomas (n 4) 88

¹⁹ Michael Singer, *Jury Duty: Reclaiming your Political Power and Taking Responsibility* (1st edition, Praeger, 2012) Introduction

ignoring the law which was based on any extra-legal standards.²⁰ However, Baldwin and McConville have pointed out researches about doubtful jury convictions are not enough.²¹ The severe restriction of disclosing the jury deliberation by Section 8 of the Contempt of Court Act 1981 had been one of the significant reasons.²²

As Brooks suggested jury nullification is subject to criticisms because it will possibly damage to the rule of law.²³ He indicated the racial bias examples among a jury.²⁴ Jury nullification is difficult to legitimise completely ignoring any problems and risks.

Has jury nullification occurred so often in this contemporary English judicial scene? Of course, there will be several racial problems or sometimes, a judge gives a direction by his or her prejudice. A jury has an opportunity to nullify the application of law and judge's direction by the use of its conscience.

Lloyd-Bostock and Thomas states that jury nullification is essential to the democratic role of the jury.²⁵ However, realistically, it is difficult to imagine that a jury will go against the Government in criminal or civil trials in England,

²⁰ See John Jackson, 'Modes of trial: shifting the balance towards the professional judge' (2002) *Criminal Law Review* 249, 269

²¹ See John Baldwin and Michael McConville, *Jury Trials* (1st edition, Clarendon Press, 1979) 46

²² The Section 8 of the Contempt of Court Act 1981 was repealed by Section 74(2) of the Criminal Justice and Courts Act 2015, however, the severe restrictions towards the disclosure of jury deliberation remains prominent.

²³ See Brooks (n 8) 402

²⁴ Ibid

²⁵ See Lloyd-Bostock and Thomas (n 4) 87

because the situation like *R v Bushell* in the seventeenth century will not happen in twenty-first century England. The jurors will be selected among most citizens who live peacefully and there will be no conflicts between them and the Government. As Lloyd-Bostock and Thomas suggested, a judge's direction will be powerfully influence on jury verdicts.²⁶ Jurors will basically follow the judge's instruction.²⁷

The possibility of jury nullification has decreased compared with the past.²⁸ Jury nullification will no longer be a practical concern nor a central difficulty which the English jury system has. Jury nullification can be discussed as just a theoretical or an academic subject.²⁹

²⁶ See Lloyd-Bostock and Thomas (n 4) 84

²⁷ On the contrary to this, there are even organisations which encourage jurors to nullify in the US, for instance, Fully Informed Jury Association (FIJA.) The organisation suggests that "Jurors can say no to government tyranny by refusing to convict." See Fully Informed Jury Association, 'Homepage' (2015) <<http://fija.org/>> accessed 8 March 2015

²⁸ As a comparison, in the US, jury nullification is sometimes done by jurors recently, and actively discussed, because the articles in the constitution clearly provide the rights of trial by jury. Singer states that jury nullification is an essential political role of the American jury: "The citizens of a democracy have the responsibility to maintain a critical attitude toward authority and should not be excessively respectful of the views of authority figures." See Singer (n 19) 30. On the other hand, as King has pointed out that, "There is no consensus about the extent to which the Constitution protects jury nullification, or in what constitutional provisions that protection may be found." in the US. See Nancy King, 'Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom' (1998) 65 University of Chicago Law Review 433, 436-437

²⁹ For example, as Brooks stated that "While there is no evidence that jury nullification happens more than infrequently at best, critics charge that it occurs too often and that its use must be curbed." See Brooks (n 8)

2.) Jury's misconduct and prejudice

a.) The category of a jury's misconduct

If a juror is guilty of misconduct, the jury panel will be discharged or a new trial will be restarted. What sort of action will be assumed as a jury's misconduct?

These have been categorised by *Halsbury's Laws of England*, as "if the jurors separate without the leave of the court,³⁰ eat or drink before the verdict at the expense of one of the parties, hold communication with any person or receive evidence, oral or documentary, out of court,³¹ determine their verdict by lot³² or, being unable to agree, have 'split the difference,'³³ or if a stranger was with them for a substantial time³⁴." In addition, it includes "drunkenness,³⁶ alleged racism,³⁷ improper pressure on other jurors,³⁸ consulting an ouija board in the course of deliberations,³⁹ declining to take part in the deliberations of the jury,⁴⁰

³⁰ See *Hughes v Budd* (1840) 8 Dowl 315; *R v Ward* (1867) 17 LT 220, CCR; *R v Ketteridge* [1915] 1 KB 467, CCA; *R v Alexander* [1974] 1 All ER 539, [1974] 1 WLR 422, CA; *R v Goodson* [1975] 1 All ER 760, [1975] 1 WLR 549, CA; *R v Chandler* [1993] Crim LR 394, CA

³¹ See *R v Shepherd* (1910) 74 JP Jo 605; *R v Willmont* (1914) 78 JP 352, CCA; *Goby v Wetherill* [1915] 2 KB 674; *R v Twiss* [1918] 2 KB 853, CCA; *R v McNeil* [1967] Crim LR 84, CA; *R v Brandon* (1969) 53 Cr App Rep 466, CA; *R v Thorpe*, *R v Nicholls*, *R v Burke*, *R v Boyd* [1996] 1 Cr App Rep 269, CA; *R v Panayis* [1999] Crim LR 84, CA; *R v Karakaya* [2005] 2 Cr App Rep 77, CA; *R v Hawkins* [2005] EWCA Crim 2842; *R v Marshall* [2007] EWCA Crim 35, [2007] All ER (D) 76 (Jan); *R v Thakrar* [2008] EWCA Crim 2359, [2009] Crim LR 357

³² See *Prior v Powers* (1664) 1 Keb 811; *Hale v Cove* (1735) 1 Stra 642; *Harvey v Hewitt* (1840) 8 Dowl 598

³³ See *Hall v Poyser* (1845) 13 M & W 600

³⁴ See *Goby v Wetherill* [1915] 2 KB 674; *R v McNeil* [1967] Crim LR 84, CA

³⁵ *Halsbury's Laws of England* (5th edition, LexisNexis, 2010) 61, 703

³⁶ See *R v Knott* (1992) *The Times*, 6 February, CA

³⁷ See *Gregory v United Kingdom* (1997) 25 EHRR 577, ECtHR

³⁸ See *R v Lucas* [1991] Crim LR 844, CA

³⁹ See *R v Young (Stephen)* [1995] QB 324, [1995] 2 Cr App Rep 379, CA

⁴⁰ See *R v Schot*, *R v Barclay* [1997] 2 Cr App Rep 383, [1997] Crim LR 827, CA

making telephone calls after retirement,⁴¹ and lunching with a barrister not concerned with the proceedings⁴².⁴³

b.) Jury's prejudice

It is difficult to prove the existence of prejudice in a juror's mind, because the prejudiced juror may not recognise that he has been affected by the prejudice.⁴⁴

Slapper has put a question: "To what extent is prejudice on the basis of, say, race, sex or class a significant feature of how juries discuss and decide cases?"⁴⁵

The standard of actual prejudice is categorised "whether a fair-minded and informed observer would conclude that there was a real danger that a juror was or would be biased in the sense that he might unfairly regard with favour or disfavour the case of a party to the issue under consideration by him."⁴⁶

However, eventually, the judge would use his discretion to decide whether the juror had prejudice or not case-by-case basis.⁴⁷ Prejudice has effects which

⁴¹ See *R v McCluskey* [1993] Crim LR 976, [1994] Cr App R 216

⁴² See *R v Devall* (1992) 13 Cr App Rep (S) 598, [1992] Crim LR 664, CA

⁴³ *Halsbury's Laws of England* (n 35)

⁴⁴ See Judge Matsch's statement, *United States v McVeigh*, 918 F Supp 1467, 1472 (WD Okla 1996)

⁴⁵ Gary Slapper, *How the Law Works* (3rd edition, Routledge, 2014) 195

⁴⁶ *Halsbury's Laws of England* (n 35) 706. See also *R v Gough* [1993] AC 646, [1993] 2 All ER 724, HL; *Porter v Magill*, *Weeks v Magill* [2001] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465; *R v Hawkins* [2005] EXCA Crim 2842; *R v Azam* [2006] EWCA Crim 161, [2006] Crim LR 776, (2006) *The Times*, 16 March; *R v Abdroikov*, *R v Green*, *R v Williamson* [2007] UKHL 37, [2008] 1 All ER 315, [2007] 1 Cr App Rep 280; *R v Khan* [2008] EWCA Crim 531, [2008] 3 All ER 502; *R v C* [2008] EWCA Crim 1033, [2008] All ER (D) 370 (Apr); *R v Thakrar* [2008] EXCA Crim 2359, [2009] Crim LR 357; *R v S* [2009] EWCA Crim 104, [2009] All ER (D) 75 (Jan); *Mitcham v R* [2009] UKPC 7, [2009] All ER (D) 145 (Apr); *R v Yemoh* [2009] EWCA Crim 930, [2009] All ER (D) 07 (Jun); *R v T* [2009] EWCA Crim 1638, [2009] All ER (D) 327 (Jul); *R v Cornwall* [2009] EWCA Crim 2458, [2009] All ER (D) 290 (Nov)

⁴⁷ See David Aaronson and Sydney Patterson, 'Modernizing jury instructions in the age of social media' (2013) 27 ABA Criminal Justice

“may encompass deliberate hostility,⁴⁸ inadvertent knowledge of the defendant’s bad character,⁴⁹ alleged racism,⁵⁰ acquaintance with prosecution witnesses⁵¹ or a close nexus with the case in some way.^{52,,53}

3.) Factors of the weaknesses of the jury process

a.) Jury composition

To avoid a misconduct of jury and a prejudice which influences the fairness of a trial, a jury composition is an important element. If a jury is composed of people who have a certain age, a gender or a race, the diversity of jury will decrease and it will be difficult to achieve a fair trial. In this section, diversity, acquittal rate and public confidence of jury trial will be examined, compared with magistrates’ courts system.

http://www.google.co.jp/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCAQFjAA&url=http%3A%2F%2Fdigitalcommons.wcl.american.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1233%26context%3Dfacsch_lawrev&ei=pVvdVJKEDsa4mAW5iYHoCg&usq=AFOjCNERq0ImOinzOG-in Wp 1YwAxbfbw accessed 8 March 2015, 4

⁴⁸ See *R v O’Coigly* (1798) 26 State Tr 1191; *R v Wright* [1995] 2 Cr App Rep 134, [1995] Crim LR 251, CA

⁴⁹ See *R v Box* [1964] 1 QB 430, [1963] 3 All ER 240, CCA; *R v Lawson* [2005] EWCA Crim 84, [2007] 1 Cr App Rep 277; *R v Lambert* [2006] EWCA Crim 827, [2006] 2 Cr App Rep (S) 699; *R v Russell* [2006] EWCA Crim 470, [2006] All ER (D) 151 (Mar)

⁵¹ See *R v K* (1995) 16 Cr App Rep (S) 966, CA; *R v Pintori* [2007] EXCA Crim 1700, [2007] Crim LR 997; *R v I* [2007] EWCA Crim 2999, [2007] All ER (D) 398 (Oct); *R v Hambleton* [2009] EWCA Crim 13, [2009] All ER (D) 67 (Jan); *R v Ali* [2009] EWCA Crim 1763, [2009] All ER (D) 214 (Jul)

⁵² See *R v Wilson* [1995] Crim LR 952, CA

⁵³ *Halsbury’s Laws of England* (n 35) 706

b.) Diversity

It is the principle that a juror must be selected at random from a panel.⁵⁴ A judge does not have the power to influence the composition of a jury. According to Thomas, only in exceptional circumstances, a judge can direct to compose a racially mixed jury.⁵⁵ However, in *R v Ford*, the Court of Appeal prevented the trial judge from constructing a racially mixed jury.⁵⁶

The abolition of peremptory challenge in 1988 has increased the diversity of jury qualification. Nowadays, even a judge may be eligible to become a juror.⁵⁷ The abolition of peremptory challenge also eliminated a potential way of ensuring a racially mixed jury.⁵⁸

The Roskill Committee which examined the ability of a jury to hear complex fraud trials noted “the efficacy of the jury system depends upon acceptance of the principle of random selection.”⁵⁹ However, because there is little diversity, the contemporary jury and lay magistrates have been concerned as fact finders which are selected from social elites. For example, Lloyd-Bostock and Thomas

⁵⁴ See Attorney General’s Office, ‘Jury vetting: right of stand by guidelines’ (2012) <<https://www.gov.uk/jury-vetting-right-of-stand-by-guidelines--2>> accessed 8 March 2015

⁵⁵ See Cheryl Thomas, ‘Exposing the myths of jury service’ (2008) 6 Criminal Law Review 415, 417-18

⁵⁶ See *R v Ford* [1989] QB 868, 89 Cr App Rep 278, CA

⁵⁷ The first judge to be called to serve as a juror was Lord Justice Dyson in June 2004. He did not serve then, but since that time some judges, and many barristers, have served. See Slapper (n 45) 193

⁵⁸ See Lloyd-Bostock and Thomas (n 4) 74

⁵⁹ Lord Roskill, *Fraud Trials Committee Report* (1st edition, Her Majesty’s Stationery Office, 1986) 125

stated that “The ‘elite’ nature of the composition of the jury had come to be seen as a threat to its legitimacy in a democratic society, and to claims that it introduced common sense and protected the ordinary citizen from the state.”⁶⁰

Actually, the gender balance of jury and magistrates has been well-managed. The number of male jurors was slightly larger than female in 1993.⁶¹ The number of male and female lay magistrates was also almost even in 2005 and 2010.⁶² Thomas argues “Serving jurors were remarkably representative of the local community in terms of ethnicity, gender, income, occupation and religion.”⁶³ For instance, retired and unemployed jurors are under-represented among serving jurors, and conversely, the employed are over-represented.⁶⁴ Her empirical research shows that it is a myth that English jury has little diversity. According to Thomas, it is clear that ethnic minorities are fairly represented in almost all the Crown Court in England.⁶⁵ If her empirical research is precise, a judge does not have to prepare any racially mixed jury.

As in a jury, lay magistrates are required to have diversity to give a fair judgment. Slapper states that the standard of selection of magistrates is “the

⁶⁰ Lloyd-Bostock and Thomas (n 4) 70

⁶¹ There were 53 per cent male jurors and 48 per cent female jurors in 1993. Interestingly, 78 per cent of all the foremen were male. See the Royal Commission on Criminal Justice, *Crown Court Study* (1993) HMSO Research Study No.19, 234

⁶² There were 14,519 male magistrates and 14,346 female magistrates in April, 2005. See *Judicial Statistics*, 2005, p.138. In 2010, conversely, male lay magistrates were slightly fewer than female. See Ministry of Justice, *Judicial and Court Statistics 2010* (Revised edition, 2011) 180

⁶³ Thomas, (n 55) 422

⁶⁴ See Cheryl Thomas, *Diversity and Fairness in the Jury System* (1st edition, Ministry of Justice, 2007) 116

⁶⁵ Ibid 58. Thomas suggests changing trial venue will be the effective choice to assure a racially mixed jury if there is any necessity. Ibid 71

people with common sense and personal integrity, with a good knowledge of people and their local community, the ability to listen to all sides of an argument and to contribute to fair and reasonable decisions.”⁶⁶ Even lay magistrates who are representatives of the people sometimes argued to be from wealth people in the English society.⁶⁷ Slapper’s research shows “Members of the working class who work in call centres, factories, quarries, steelworks, on the railways and in office cleaning do not feature in any great numbers on the bench. Similarly, only 4.5 per cent of magistrates are disabled, compared with 15 per cent of the adult working age population in England and Wales.”⁶⁸ In 2003, only 3.7 per cent of the magistrates in England were aged under forty, and 79.8 per cent of them were over fifty.⁶⁹ In addition, according to the same statistics, 93.7 per cent of magistrates were white and only six per cent had minority ethnic backgrounds.⁷⁰

Conversely, the English judiciary proudly stated in its website that all lay magistrates are “mixed in gender, age, ethnicity etc. whenever possible to bring a broad experience of life to the bench.”⁷¹ According to Slapper, it is because of the Governmental effort to enlarge the social base of magistrates’ pool for the last two decades.⁷² In addition, according to Sprack, the Lord Chancellor make

⁶⁶ Slapper (n 45) 53

⁶⁷ Ibid 55

⁶⁸ Ibid 57

⁶⁹ See Department of Constitutional Affairs, ‘National Strategy for the Recruitment of Lay Magistrates’ (2003)

<<http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/magist/recruit/magrecruit.htm>> accessed 8 March 2015, Annex D, 4

⁷⁰ Ibid

⁷¹ Judiciary of England and Wales, ‘Magistrates Court’ (2015)

<<http://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/magistrates-court>> accessed 8 March 2015

⁷² Slapper states that “This change can be seen as having been made, in some respects, as a response to substantial social changes such as the growing diversification of racial and

effort to maintain a gender and age balance, for instance, introducing “younger people in their thirties or early forties to the magistracy.”⁷³ To evidentially support such an effort by the Lord Chancellor, there are statistics which show about 8.1 per cent of the 25,170 magistrates came from minority ethnic communities in April 2012.⁷⁴

However, unlike the diversity of lay magistrates, the diversity of District judges who are professionals has not been well-balanced. According to the Judicial Diversity statistics in 2012 April, among 141 District judges at magistrates’ courts in England, only 29.1 per cent are female.⁷⁵ In terms of ethnicity, 104 are white, four are Asian background, and 33 are unknown. Surprisingly, only twelve magistrates are under fifty year-old, and the other 129 are over fifty year-old. It predicts District judges needs more diversity than lay magistrates and a jury.

c.) Acquittal rate

It has been said that a jury tends to have a high acquittal rate compared with magistrates’ courts and non-jury criminal trials. This was counted as one of the merits of the English criminal jury system to assure fairness and justice. In

cultural components of UK society, and changes in family patterns.” See Slapper (n 45) 56

⁷³ John Sprack, *A Practical Approach to Criminal Procedure* (14th edition, Oxford University Press, 2012) 93

⁷⁴ See Slapper (n 45) 57

⁷⁵ See Judiciary of England of Wales, ‘2012 Judicial Diversity statistics - Gender, Ethnicity, Profession and Age’ (2012) <<http://www.judiciary.gov.uk/wp-content/uploads/2014/05/tribunal-diversity-breakdown-sept12.xls>> accessed 8 March 2015

2013-2014, the conviction rate of defendants in the Crown Court was 80.5 per cent and in the magistrates' courts was 84.4 per cent.⁷⁶

Therefore, it seems to be not so large differences between the Crown Court and the magistrates' courts. Jurors seem to think their verdict were well-balanced.

According to *Crown Court Study* in 1993, when jurors asked whether the sentence was unexpectedly high or low, 32 per cent of them answered the sentence was as same as they had expected, and the same amount of jurors responded there are no objections as regards sentence.⁷⁷ 14 per cent of jurors thought the sentence was more severe than they predicted and conversely 23 per cent of them answered it was less severe.⁷⁸

According to *Crown Court Study* in 1993, white defendants tend to be acquitted more than non-white defendants.⁷⁹ However, Thomas's recent empirical research shows that the conviction rates by jury have only small differences among defendants based on their ethnicity.⁸⁰

⁷⁶ See The Crown Prosecution Service, 'Key Measures 2013-2014' (2014) <http://www.cps.gov.uk/publications/performance/key_measures/index.html> accessed 8 March 2015

⁷⁷ See the Royal Commission on Criminal Justice (n 61) 223

⁷⁸ Ibid

⁷⁹ Jurors were asked only to distinguish between white and non-white. The jury acquittal rate in 279 cases where the jurors noted the defendant was white was 45 per cent, compared with 33 per cent in 66 cases where they noted he was non-white. Ibid 161

⁸⁰ See Cheryl Thomas, *Are Juries Fair?* (1st edition, Ministry of Justice Research Series 1/10, 2010) 24. The jury conviction rate of white defendants was 63 per cent, of black defendants was 67 per cent, of Asian defendants was 63 percent, of other ethnic defendants was 64 per cent, of unknown ethnic defendants was 65 per cent in 2006 to 2008. Ibid 22

d.) The cost in both money and time

It is often asserted that jury trial wastes so much money and is time-consuming. For example, the Law Commission suggested that “Trial by judge alone could be quicker and cheaper than with a jury.”⁸¹ However, is it real? Elliott and Quinn suggested that “A Crown Court trial currently costs the taxpayer around £7,400 per day, as opposed to £1,000 per day for trial by magistrates.”⁸² Compared with a magistrates’ trial, jury trial needs more money obviously. The Bar Council’s statistics in 2002 showed 27 per cent of sampled English people supported reducing the number of jury trials for the purpose of saving money.⁸³ It also indicated that 69 per cent of the sample would oppose such a reduction for cost saving. From this data, the cost problem would not be the decisive reason for the restriction of the English jury system, although whether the sampled people actually realised how costly the English jury is recently referring to an appropriate statistics were uncertain.

Ministry of Justice suggests the jury service will usually finish within ten working days.⁸⁴ In addition, the average hearing time for defendants who

⁸¹ The Law Commission (n 16) 25

⁸² Catherine Elliott and Francis Quinn, *English Legal System* (6th edition, Longman, 2005) 198

⁸³ See Bar Council, *The Views on Trial By Jury: The British Public Takes a Stand* (1st edition, The Bar Council, 2002); Julian Roberts and Mike Hough, *Public opinion and the jury: an international literature review* (1st edition, Ministry of Justice Research Series 1/09, 2009) 21

⁸⁴ See Ministry of Justice, ‘Your Role as a Juror’ (2012) <<http://www.youtube.com/watch?v=JP7slp-X9Pc&feature=relmfu>> accessed 8 March 2015

pleaded not guilty in sent for trial cases in the Crown Courts was 19.5 hours.⁸⁵ Darbyshire stated that two weeks jury service is not an unreasonable burden on an English citizen “who appears to ‘believe’ in the jury system.”⁸⁶ However, Elliott and Quinn have pointed out that a jury tends to spend much of its time “waiting around to be summoned into court.”⁸⁷ According to *Judicial and Court Statistics 2010*, the average waiting time for defendants sent for trial at the Crown Court was 19.3 weeks.⁸⁸ Moreover, offence-to-completion time of a jury trial at the Crown Court was an average of 187 days in 2010.⁸⁹ On the other hand, the estimated average offence-to-completion time in the magistrates’ courts was 109 days in December 2010.⁹⁰ In other words, a juror needs to keep the dates around the trial free regardless of whether they will be actually summoned or not. The uncertain schedule would be clearly burdensome for a juror.

Kirk stated that “It may be said that when the modern jury system was put in place, in the 19th century, and until the 1970s, the duty of the citizen to serve on a jury was very unlikely indeed to extend beyond two weeks.”⁹¹ Are there any

⁸⁵ See Ministry of Justice (n 62) 85

⁸⁶ Penny Darbyshire, ‘Part D: conclusions and recommendations’ in Penny Darbyshire, Andy Maughan and Angus Stewart, *What can the English legal system learn from jury research published up to 2001?: Research Papers in Law* (1st edition, Kingston University, 2002) 64

⁸⁷ Elliott and Quinn (n 82)

⁸⁸ See Ministry of Justice (n 62) 3

⁸⁹ See Ministry of Justice, *Time Intervals Survey of Criminal Proceedings in Magistrates’ Courts December 2010* (1st edition, 2011) 17

⁹⁰ Ibid 8

⁹¹ Therefore, Kirk argued that a jury service may be a “colossal burden for anyone, particularly for those with private sector jobs, or those with childcare, or other caring, responsibilities. See David Kirk, ‘Fraud trials: a brave new world’ (2005) 69 *Journal of Criminal Law* 508, 512

solutions for addressing a long trial and the substantial burden from a jury?

When a trial is estimated to spend longer time, the Crown Court asks prospective jurors whether this will cause any difficulties in their schedule.⁹²

According to Lloyd-Bostock and Thomas, a jury summoning officer has the discretion to excuse jury candidates or grant a deferral, for the reason of their schedule of work, childcare, or holidays.⁹³ It has been seen to be a solution for avoiding the burden for a juror's because they feel a business has a priority than the jury service. However, to have got a grant for a deferral, a genuine reason is essential.⁹⁴ A jury candidate will not basically be excused because of their demanding job regardless of whether they are self-employed or not.⁹⁵

In most cases, jury deliberations finishes within an hour or two hours: *Crown Court Study* showed "over 62 per cent took under two hours and 87 per cent took under four hours."⁹⁶ Jury deliberation is not a reason for the long trials. According to *Crown Court Study*: where the trial lasted under half a day, the jury deliberation will be finished within two hours in 96 per cent of cases.⁹⁷

Where the case lasted three to four days the jurors and the jury deliberation was same length, the rate was only 15 per cent.⁹⁸ When it lasted over two weeks, the

⁹² See Ministry of Justice (n 84)

⁹³ See Lloyd-Bostock and Thomas (n 4) 71

⁹⁴ Ibid

⁹⁵ Ibid

⁹⁶ It continues "Eleven per cent of jurors said their jury was out for between four and eight hours and two per cent said they were out for over eight hours." See the Royal Commission on Criminal Justice (n 61) 224

⁹⁷ See the Royal Commission on Criminal Justice (n 61) 225

⁹⁸ Ibid

jurors needed more than four hours in nearly 75 per cent of the cases.⁹⁹ Only one per cent of jury trials made the jury stay together overnight.¹⁰⁰

As Darbyshire has pointed out, that “Jury service can be very stressful, emotionally and physically.”¹⁰¹ If the length before the jury deliberation is shortened, it will ease the jury burden. Moreover, *Crown Court Study* found that longer cases will be more likely decided by majority verdicts.¹⁰² This association between the length of the case and a majority verdict shows the difficulty and complexity of a case would be the reason for a long trial. If the case is easy to understand or leads to one decisive verdict promptly, the trial will be shortened. In the case of a sensitive or complex one, some people insist that a non-jury criminal trial will be the solution towards the problem of time-consuming in a criminal jury trial. Conversely, Darbyshire stated that “reducing jury service to a week would be likely to increase the acquittal rate.”¹⁰³ Ease of jury burden from a long trial will be compatible with an assurance of a fair trial. Taking a balance between them will be the significant element to consider the solution of cost in both money and time.

⁹⁹ See the Royal Commission on Criminal Justice (n 61) 225

¹⁰⁰ Ibid

¹⁰¹ Darbyshire (n 86) 67

¹⁰² When jurors heard a one-day case, only two per cent of the cases were decided by majority verdicts. However, when they heard a case over a week, the rate was nearly 75 per cent. See The Royal Commission on Criminal Justice (n 61) 162

¹⁰³ Penny Darbyshire, ‘What can we learn from published jury research? Findings for the Criminal Courts Review’ (2001) *Criminal Law Review* 970, 977. Darbyshire continued that, she therefore disagrees with the idea of such a shortening the jury service which will causes the risks of miscarriage of justice. See also Darbyshire (n 86)

4.) Maintaining public confidence in the justice system

As Lord Falconer suggested, the theory of Government is that “Allegations of juror impropriety should continue to be handled by the courts on a case by case basis given the diverse nature of behaviour that may be legitimately complained of.”¹⁰⁴ No statute has specified the composition of a jury in detail. The assurance of diversity of a jury to achieve fairness is dependent on each judge’s conscience and discretion. It is a significant responsibility since the composition of a jury decides not only the destiny of the defendant, but the credibility of English criminal jury system.

Lord Falconer stated that “Confidentiality is key to the jury process.”¹⁰⁵ Thomas suggests jury has been widely supported by English citizens according to her statistics. Thomas has pointed out over 80 per cent of the public have confidence in a jury. It is obvious that this rate is relatively high. People who support the jury system believe that a juror may reach the right decision, that jury trial is fairer than judge-only trial and that juries have produced better decisions related to justice since the age of *R v Bushell*.¹⁰⁶ Although public support for the English jury system seems to be strong, the basis for this has been unclear. During the question time after my presentation on ‘The Pressures on the Judicial Participatory Democracy in England’, at the Howard League International Conference 2013 in Keble College, Oxford University, one of the

¹⁰⁴ Charles Falconer, ‘Foreword’ in Department for Constitutional Affairs, *Jury Research and Impropriety* (1st edition, Consultation Paper CP04/05, 2005) 7

¹⁰⁵ Ibid 3

¹⁰⁶ See Thomas (n 64) 3

audience raised her hand and stated that the reason for the high level of public confidence in the English jury system is because “it is our tradition, like drinking a cup of tea, which will never become extinct.”¹⁰⁷ When I heard this quite sentimental opinion, I was a bit confused, but I realised we must probably not completely deny that the traditional element of support for the long-lived English jury system is an important reason why there is such high level of public confidence. According to Roberts and Hough, “Since levels of public knowledge have not been tested, it is hard to know whether people favour the retention of jury trials because they appreciate the role that the jury plays in the criminal justice system, or, rather, simply out of adherence to the general notion of community input.”¹⁰⁸

The ICM research also shows that public support for a right to a fair trial before a jury was 89 per cent in 2006.¹⁰⁹ According to Mathews et al., 50 per cent of the people who received a jury summons before their trials stated that they are enthusiastic on their service.¹¹⁰ They positively perceived their jury service such

¹⁰⁷ An audience’s opinion on my presentation on *The Pressures on the Judicial Participatory Democracy in England*, The Howard League International Conference 2013, Keble College, Oxford University (1 October 2013)

¹⁰⁸ Julian Roberts and Mike Hough, ‘Public Attitudes to the Criminal Jury: a Review of Recent Findings’ (2011) 50(3) *The Howard Journal of Criminal Justice* 247, 261

¹⁰⁹ See ICM Research, *State of the Nation 2006: Summary Results* (1st edition, ICM Research, 2007); Roberts and Hough (n 83) 14

¹¹⁰ See Rodger Mathews, Lynn Hancock and Daniel Briggs, ‘Jurors’ perceptions, understanding, confidence and satisfaction in the jury system: a study in six courts’ (2004) Home Office Online Report

<http://www.google.co.jp/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Fwebarchive.nationalarchives.gov.uk%2F20110218135832%2Fhttp%3A%2F%2Fhomeoffice.gov.uk%2F%2Fpdfs%2F%2Fsolr0504.pdf&ei=zV7hVObzII_x8gX3_4AQ&usq=AFQjCNGunS7IXvZgQBE8PRMOt0CVRuNXvg>
accessed 8 March 2015, 25

as an interesting event, a valuable experience, and/or an essential moral duty to society.¹¹¹

Conversely, 31 per cent of the jury summoned people were reluctant.¹¹² The reason for their reluctance was mainly because of their business (45 per cent) or family pressure (37 percent.)¹¹³ Mathews et al. have correctly pointed out the complex and sensitive feeling of those reluctant people that, “Among those who were reluctant, however, it was often not because they did not feel that jury service was important, or that they did not want to perform their civic duty, but because they had concerns about the possible impact on their employment prospects and their domestic lives. Because of the difficulties some people envisaged in trying to fit jury service into their normal lives, many applied for a deferral.”¹¹⁴

Mathews et al. also found that 63 per cent of the jurors changed their perception of the English jury system positively after their jury experiences.¹¹⁵ Most of them seemed to appreciate the well-prepared court management treating the cases and defendants and professionalism by the trial judge and court staffs.¹¹⁶ On the other hand, only eight per cent of jurors changed their image of

¹¹¹ See Mathews et al. (n 110) 26

¹¹² Ibid 25

¹¹³ Ibid 25 and 27. Mathews et al. illustrated that the family pressure was “from difficulties associated with changing their routine, from perceived problems of travel and from the general interruption of their daily lives.” Ibid 26

¹¹⁴ Ibid 26-27

¹¹⁵ Ibid 32

¹¹⁶ Ibid 33

negatively, and 28 per cent of the people were neutral.¹¹⁷ The negative opinions were largely against the delay of the proceedings, the trivial nature of cases and the court facilities.¹¹⁸ Mathews et al. stated that, “Jurors who had initially stated that they were ‘enthusiastic’ about engaging in jury service were also most likely to express a positive perception of the process. However, significantly, just over half of jurors who stated that they were reluctant, for whatever reasons, to undertake jury service initially, ended up with a positive attitude towards the jury system”¹¹⁹ at the result of their jury experiences. There is another statistics which shows that 77 per cent of jurors noted they were satisfied with their jury experience after the trial.¹²⁰ From these statistics, their jury experiences seemed to have not so large negative changes and influences on their perception of the English criminal jury system.¹²¹ Although 55 per cent of jurors responded that they are happy to repeat their jury service again in the future, 15 per cent of them replied they do not want to engage it any more.¹²² Mathews et al. have pointed out that “while 11 per cent stated they would not really want to do it again, although some qualified this adding that they would be reluctant, but would do it again because it is a ‘civic duty.’”¹²³ It could be said that this reflects the juror experienced people’s sensitive feelings on the jury service.

¹¹⁷ See Mathews et al. 32

¹¹⁸ Ibid 33

¹¹⁹ Ibid

¹²⁰ See Ministry of Justice, *Crown Court Survey of Jurors: Ministry of Justice Statistics Bulletin* (1st edition, 2010) 4

¹²¹ According to the *Crown Court Survey* in 2010, 19 per cent of jury candidates had strongly agreed that they had confidence in the English criminal justice system before beginning their jury service. After finishing the jury service, it increased the number, and 25 per cent of jurors responded same positive answers. In total, same rate (69 per cent) of jurors indicated their confidence in the English criminal justice system before and after their jury services. See Ministry of Justice (n 120) 28

¹²² See Mathews et al. (n 110) 65

¹²³ Ibid

Despite this high public confidence, the possibility of miscarriages of justice by a jury cannot be denied. The *Runciman Report* suggested that, “We have simply to acknowledge that mistaken verdicts can and do sometimes occur and that our task is to recommend changes to our system of criminal justice which will make them less likely in the future.”¹²⁴

If jury trial does not satisfy the defendant and there are legitimate reasons, the defendant will appeal the case to the Court of Appeal. Grieve has pointed out that “Appeals against conviction which rely on complaints about failings of jurors are rare.”¹²⁵ However, there are data in 2010 which shows 45 per cent of the appeals from the Crown Court were allowed or varied.¹²⁶ 30 per cent were dismissed and 25 per cent were abandoned or disposed.¹²⁷ In other words, over majority of appealed verdicts by a jury was revised at the Court of Appeal. This rate raises a doubt about the credibility and the efficiency of jury verdicts in the English criminal justice system.

On the other hand, The *Judicial Statistics Annual Report* in 2006 showed that the number of appeals from the magistrates’ court to the Crown Court was only

¹²⁴ Royal Commission of Criminal Justice, *Royal Commission Report on the Criminal Justice System* (Cmd 2263, 1993) 3. The so-called *Runciman Report*.

¹²⁵ Dominic Grieve, ‘Speech on the jury system and the challenges it faces, given as part of Politeia’s justice series’ (2013)

<<https://www.gov.uk/government/speeches/in-defence-of-the-jury-trial>>

accessed 8 March 2015, 3

¹²⁶ See Ministry of Justice (n 62) 91

¹²⁷ Ibid

12,992 cases.¹²⁸ It could be said that the appeal rates both from the magistrates' courts are not so high compared with the appeal rates from the Crown Court.

There are statistics which show that 70 per cent of defendants prefer jury trial to judge-only trial in the Crown Court.¹²⁹ In other words, for 30 per cent of defendants, there are different preferred choices including magistrates' trial or judge-only trial.

Blom-Cooper suggests "There is every reason for retaining the jury system, if only because the British public appears to have confidence in it. But advances in technology, communication and science, together with the complexity and sophistication of today's criminal law, the intricacies of admissible evidence and the length and cost of jury trial, should lead any politician or legislator to consider modifications of jury trial."¹³⁰ The gradual rising public concerns and pressure to jury trial in certain cases moved the English legislators to the reform of jury trial recently.

¹²⁸ In other words, it is just 0.07 per cent of total cases at magistrates' courts. See Ministry of Justice, *Judicial and court statistics 2006* (1st edition, Cmd 7273, 2007) 116

¹²⁹ See the Royal Commission on Criminal Justice (n 61) 172

¹³⁰ Louis Blom-Cooper, 'Judge only trials should be an option for serious organised crimes' *the Guardian* (London, 21 May 2010)

2. The practical weaknesses of jury trials— dealing with jury tampering

Although jury trials seem to still have strong public confidence in England, it has directed several pressure because of its practical weaknesses in contemporary English society. In this part, firstly, the problem of jury tampering will be discussed as a serious pressure on the English criminal jury system.

1.) Jury tampering and the Criminal Justice Act 2003, Part7

Jury tampering is one of the most controversial problems among the difficulties in the contemporary English jury system. Recently, the Central Criminal Court (the Old Bailey) judged *R v Twomey and others* which involved a jury tampering in the spring of 2010 as the monumental first non-jury criminal trial in the contemporary English legal history. Since the case, the English judges are hesitating and being prudent about the use of a non-jury criminal trials although the Criminal Justice Act 2003, Part 7, makes law them. This situation shows the court considers how the jury tampering problem is very sensitive and needs to be deliberately approached, since it restricts the traditional people's right to jury trials.

This section will especially focus on the Criminal Justice Act 2003 which introduces a non-jury criminal trial in a case of jury tampering. It will demonstrate several cases which attempt to use non-jury criminal trials and their complex difficulties. Although the Criminal Justice Act 2003, Part 7, introduces

a non-jury trial, it is not the first time in the contemporary United Kingdom. There have already been non-jury criminal trials in Northern Ireland since the 1970s. They are the so-called ‘Diplock courts.’ The Diplock courts were introduced because of the complex political, ethnic and religious conflicts in Northern Ireland. Although the historic background is different, the experience in Northern Ireland gives us meaningful lessons when we consider the effectiveness of jury trials in contemporary England. Therefore, the latter part of this section will analyse Northern Irish experience of non-jury criminal trials and compare with the contemporary English jury tampering problem.

a.) The notion of jury tampering

Jury tampering is also called ‘jury nobbling’ or ‘embracery.’ Jury tampering has two categories; bribery and jury intimidation. Once a jury tampering is exposed, a judge needs to stop trials and discharge jurors since there is an element which would makes the trial unfair and untrustworthy.

The reason which makes jury tampering a troublesome problem is that it leads the jury to perverse verdicts.¹ Once jurors are subject to tampering, some of them may be disturbed and damaged physically or emotionally.² Therefore, such a burden on a jury will inevitably influence its verdict and harm the fairness of the trial and justice.

¹ See Malcom Davies, Hazel Croall, and Jane Tyrer, *Criminal Justice* (4th edition, Pearson Education Limited, 2010) 316

² See Robin Auld, *A Review of the Criminal Courts of England and Wales* (2001) Ministry of Justice 218 (The so-called *Auld Report*)

The purpose of jury tampering is an attempt to influence jurors in order to acquit. Conversely, there are jury tampering cases to find the defendant guilty. An offender often approaches a juror near his or her house or on the way to the court.³ Therefore, police usually provides jurors with protections on their commute to the court. Although police protects them, this alone was not a decisive enough solution to the problem. Various legal frameworks and strategies against jury tampering are essential.

i.) Bribery

Providing money for a jury which let them to acquit or convict the defendant is a form of jury tampering. This is bribery. Bribery has been achieved by offering money between a few hundred to thousands of pounds.⁴ Once a juror receives the money, the favoured party will influence the jury verdict indirectly through the bribed juror to achieve a preferable goal for the party, thus it will contaminate a jury verdict. Ian Blair, the Deputy Commissioner of the Metropolitan Police Service, raised several jury bribery cases in his interview including one in Essex.⁵ In the case, cash money was left on one of the juror's car windscreen.⁶ He also raised another instance in Merseyside where a juror was allegedly offered bribery of £10,000 from the defendant side.⁷

³ See 'Nobbled' *The Economist* (London, 18 September 1982) 31

⁴ Ibid

⁵ The Metropolitan Police Service covers Greater London administrative division except the City of London area which is the working territory of the City of London Police.

⁶ See Ian Blair, 'Moves to prevent jury tampering' *The Times* (London, 15 July 2003)

⁷ Ibid

ii.) Jury intimidation

Another type of jury tampering is jury intimidation. Jury intimidation would certainly include a risk of inflicting physical and psychological harms on a juror. Offenders will not always approach and intimidate a juror face to face. For example, persistent staring at jurors from the public gallery in the court room is treated as jury intimidation.⁸ Writing letters to the jury to ask a juror to acquit can be treated as jury intimidation too.⁹

Moreover, once jury intimidation happens, the jury trial will collapse very easily and quickly. The example in Merseyside collapsed after four weeks since it was discovered that two jurors had been threatened.¹⁰ Therefore, jury intimidation will also be a menace to fair jury trials in the same way as bribing a jury.

Ward and Davies stated that practicing lawyers have directed numerous collapsed trials or difficulties by jury tampering.¹¹ As Ian Blair mentioned in the Home Affairs Committee, there has been a wide range of variation in jury tampering.¹² Jury tampering is an efficient way to contaminate a fair trial and an

⁸ In the trial at Norwich Crown Court of *R v Martin* [2001] EWCA Crim 2245, [2002] 1 Cr App R 27, an anonymous caller to a radio station who suggested that she was a juror in the case claims some people stared at the jury and her from the public gallery during the trial.

⁹ *R v Bowen* [1996] 1 Cr App R (S) 63 was an example.

¹⁰ See Blair (n 6)

¹¹ See Richard Ward and Olwen Davies, *The Criminal Justice Act 2003* (1st edition, Jordans, 2004) 75

¹² See House of Commons Home Affairs Committee, *Criminal Justice Bill Second Report of Session 2002-2003* (2002) HC 83, Ev 14

easy way to compromise and eradicate the credibility of the English criminal jury trial.¹³

b.) The various attempts against jury tampering

According to Ian Blair, jury intimidation which perverts the course of criminal justice is not something new, and it has been growing.¹⁴ The resolution of jury tampering problem was not so effective and decisive. Until the Criminal Justice Act 2003 was enacted, the only action which a trial judge did if he or she found any jury tampering was discharge part of the jury, or the entire jury, and terminate the trial.¹⁵ Pattenden has pointed out the inconvenience and expense of a retrial after a judge found jury tampering and discharged a jury.¹⁶ To exercise his or her right to discharge or terminate the trial, the judge needs to find any strong evidence of jury tampering or attempts of jury tampering.¹⁷ Therefore, since the 1960s, several legal frameworks have been established against jury tampering to assure the fairness and credibility of jury trial.

i.) Majority verdicts: the Criminal Justice Act 1967 and Juries Act 1974

For the most part of the long history of English jury trials, it was required that the jury's verdicts be agreed upon unanimously. However, to assure the fair jury

¹³ See *The Economist* (n 3)

¹⁴ See Blair (n 6)

¹⁵ See Home Office, *Justice for All* (Cmd 5563, 2002) 75 and Ward and Davies (n 11) 78

¹⁶ See Rosemary Pattenden, 'R v T: trial by judge alone' (2009) *International Journal of Evidence & Proof* 355, 356-357

¹⁷ See *Justice for All* (n 15)

trial avoiding jury tampering problems, majority verdicts system was introduced to avoid jury tampering by the Criminal Justice Act 1967. The Government predicted a jury to decide the verdict smoothly by majority regardless of any tampering and assure fair criminal jury trial. Blake criticised the majority verdicts system has been introduced without based on any evidence of specific jury tampering which was substantially not existed.¹⁸ This difficulty in finding evidence of jury tampering has been continually discussed and criticised in the later Parliament debates on the enactment of the Criminal Justice Act 2003, and the situation has remained unchanged.

ii.) Jury intimidation as a criminal offence: the Criminal Justice and Public Order Act 1994

Section 51 of the Criminal Justice and Public Order Act 1994 is the first piece of English legislation which clearly labels jury intimidation as a criminal offence in the English legal history.¹⁹ The Section makes an action which attempts to intimidate or harm a juror or witness a criminal offence.²⁰ Such an offender is

¹⁸ See Nicholas Blake, 'The Case for the Jury' in Mark Findlay and Peter Duff (ed), *The Jury Under Attack* (1st edition, Butterworths, 1988) 143

¹⁹ Section 54(1)(b) and (3) of the Criminal Procedure and Investigations Act 1996 also provides the offence of jury tampering. The Section states that the High Court will "order quashing the acquittal" where a defendant has been "convicted of an administration of justice offence involving interference with or intimidation of a juror or a witness (potential witness) in any proceedings which led to the acquittal." Then the proceedings will "be taken against the acquitted person for the offence of which he was acquitted," by Section 54(4) of the Act

²⁰ See Section 51(1) and (2) of the Criminal Justice and Public Order Act 1994

punishable, and in the most serious case, he or she will be imprisoned for a maximum of five years.²¹

Unfortunately, Section 51 was not efficient enough to prevent jury tampering, especially the trials by jury on organised crimes. Therefore, any additional solution by court was required to deal with jury tampering on its own until the Criminal Justice Act 2003 was enacted.

iii.) Court management against jury tampering

Court has also made an effort in its management including several attempts to avoid negative influences on jury verdicts caused by jury tampering in addition to these legal frameworks.

Court will need to carefully treat the name list of the jurors since it will be highly private information which will open the door to jury tampering if it is passed to malicious parties. For example, in *R v Bowen*, the defendant took note of the name of the jurors when they were called to the jury box in the trial. The defendant searched and found their telephone numbers and even addresses by use of a public telephone directory.²² It is natural to assume that most defendants have a strong desire to be acquitted. If they have an opportunity to contact the jurors to influence their decision in some way for an acquittal, they will take the opportunities. This logic is applied to the potential desire of the

²¹ See Section 51(6) of the Criminal Justice and Public Order Act 1994

²² See *R v Bowen* (n 9)

victims' side in the same trial. Therefore, the court management that lacks these considerations and necessary care, including calling the name of jurors at court in front of all parties, could cause a possible risk of jury tampering.

There is another case which attempts to solve the jury tampering problem and court management. In *R v Comerford*,²³ the trial judge of the Crown Court received the evidence of jury tampering after the opening of the prosecution.²⁴ Therefore, he discharged the jury, and ordered necessary police protection for the second summoned jury. In addition, the court directed the procedure to hide the name of each juror in the jury-box before they were sworn, and to call them by numbers instead of their names. In the case, although the defence counsel voiced its complaint against such a direction by the judge, since no reason for the judge's decision to order jury protection and evidence of danger of jury tampering was shown to the defendant, the judge of the Court of Appeal affirmed that the direction by the trial judge of the Crown Court appropriately satisfied the requirements of the Juries Act 1974.²⁵ The defendant's counsel

²³ *R v Comerford* [1998] 1 Cr App R 235. Similar treatment by the court was carried out on the trial of *R v Martin* at Norwich Crown Court. In *R v Martin*, once a possibility of jury intimidation was exposed, the court ordered to put the jurors under high level protection by police and the names of the jurors were not disclosed in open court. See *R v Martin* (n 8)

²⁴ The court was submitted an 'apparently compelling' piece of evidence that there was a person, staring at the first summoned jurors from the public gallery of the court and taking a note of the jurors' names. See *Ibid* 243

²⁵ According to the judge, Section 12(3) of the Juries Act 1974 requires to clarify "the time of the challenge," and it does not necessarily require to announce "the name of the juror" to be public. Barsby supported this interpretation in her commentary since Section 18(1)(c) of the Juries Act 1974 stated that any verdicts shall not be reversed because of a juror being "misnamed or misdescribed." It needs to support the judgment since calling numbers instead of names of the jurors would not affect the jury verdict and the defendant preserves an opportunity to challenge for each juror cause, therefore, the fairness of the criminal jury trial is assured. See Clare Barsby, 'Jury protection-names of jurors not called aloud in open court-jurors referred to by number' (1998) Criminal Law

also argued that “The prosecutor should, whenever possible, make his application in the presence of the defence and give reasons for making it and call evidence in support of the application.”²⁶ The judge stated that such a suggestion from the defendant’s counsel was “an ideal which cannot always be achieved in practice”²⁷ and in this case, it was impossible to do so. Moreover, thanks to the judge’s direction, the jurors had been sworn successfully and safely in *R v Comerford*.²⁸ Therefore, it will not be any harm to the defendant’s legal rights to challenge for each juror cause, and it will not be unfair although the jurors will be called by a number rather than their name.

The layout and design of the Crown Court is also important to avoid jury tampering. At the Crown Court, people usually see the faces of jurors clearly from a public gallery in the court room. This may lead to a risk of jury tampering. For instance, in the trial of *R v Martin* at Norwich Crown Court, there were complaints that some people persistently stared at the jury from the public gallery in the court room. This is treated as a type of jury intimidation.²⁹

The *Runciman Report* suggests that “If the public gallery in a particular courtroom is sited in such a way as to facilitate intimidation of the jury by members of the public, then sensitive cases should if practicable be assigned to

Review 285, 286

²⁶ *R v Comerford* (n 23) 242

²⁷ Ibid 242

²⁸ Ibid 245

²⁹ Eventually, there was no evidence of such staring from the public gallery, therefore the complaint was rejected in the trial. See *R v Martin* (n 8)

another courtroom in the same Crown Court Centre.”³⁰ The Report cares about the court layout and design since it is an important mean to prevent jury tampering.³¹ It suggests that a jury box have to be covered from the public gallery at a court room “to make the identification of individual jurors more difficult, and to protect jurors from threatening behaviour from spectators.”³² This is correct and needs to be avoided supplying the parties with any opportunity to approach jurors in the Crown Court since it would have a potential risk of jury tampering.

It is not difficult to predict that the Central Criminal Court has enough court rooms which accommodated jurors in the public gallery which will not be seen by potentially dangerous parties. It is unlikely to prepare such a considerate court room in all the Crown Courts in England when considering the cost performance and budget. Unfortunately, the layout and design of the Crown Court does not always fully separate the spaces for the parties involved and the jurors.

During a trial, jurors need to get a permission from the court to leave from the jury area or building of the court.³³ The jury will be also instructed to avoid visiting local café and pubs, instead eat only in the canteen for jurors at the

³⁰ Royal Commission of Criminal Justice, *Royal Commission Report on the Criminal Justice System* (Cmd 2263, 1993) 136. The so-called *Runciman Report*.

³¹ Ibid

³² Ibid 143

³³ See Ministry of Justice, ‘Your Role as a Juror’ (2012)
<<http://www.youtube.com/watch?v=JP7slp-X9Pc&feature=relmfu>>
accessed 8 March 2015

court.³⁴ This is certainly understandable since there was a case, *R v Thompson*, in which somebody in relation to the party approached a member of the jury at the canteen of the Crown Court.³⁵ According to Mathews et al.'s empirical research, 17 per cent of jurors responded that, they met the accused in the street near the Crown Court, and 14 per cent of them saw the family of the accused coming into or out of the Court.³⁶ It can be subject to criticisms as a default of the court management and constitutes significant carelessness. Hence, a remarkable idea in the *Runciman Report* needs to be respected that "so far as practicable, jurors should not need to wait or eat in areas to which ordinary members of the public have access and, to the extent that the design and layout of the court centre permits, separate areas should be set aside as waiting rooms and restaurants for jurors."³⁷ Although it requires a large monetary commitment, it is necessary for the Crown Court to separate the zones and spaces for the parties involved and the jurors to avoid jury tampering.³⁸

³⁴ See Catherine Elliott and Francis Quinn, *English Legal System* (6th edition, Longman, 2005) 197

³⁵ See *R v Thompson* [2010] EWCA Crim 1623, [2011] 1 WLR 200 (CA(Crim Div)) 209

³⁶ See Rodger Mathews, Lynn Hancock and Daniel Briggs, 'Jurors' perceptions, understanding, confidence and satisfaction in the jury system: a study in six courts' (2004) Home Office Online Report
http://www.google.co.jp/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Fwebarchive.nationalarchives.gov.uk%2F20110218135832%2Fhttp%3A%2Ffrds.homeoffice.gov.uk%2Ffrds%2Fpdfs%2F2Frdsolr0504.pdf&ei=zV7hVObzII_x8gX3_4AQ&usg=AFQjCNGunS7IXvZgQBE8PRMOt0CVRuNXvg accessed 8 March 2015. 70

³⁷ *Runciman Report* (n 30) 143

³⁸ For example, the canteen of the Crown Court can be separated by the removable compartment wall to the different area for the party, jurors, judges and observers.

iv.) The police protection for jurors and its difficulties

Although the judge discharges the jurors, approached by the offenders in these types of cases, he or she may need to continue the trial with new jurors. It will be certainly nonsense if the second summoned jurors are also approached.³⁹

Therefore, the trial judges of the Crown Courts sometimes ask police to protect jurors from jury tampering and try to ensure a fair trial, if certain conditions are satisfied.⁴⁰

Jury protections is started by police when “a real and present danger”⁴¹ of jury tampering is “perceived to exist,”⁴² according to the judgment of *R v Comerford*.

The Court of Appeal also states that “It is enough to say that if there is material from which the judge can fairly infer that the risk of interference is substantially increased then he can authorise protection.”⁴³

The statistics of the amount of jury protection are not released clearly.

According to the Home Affairs Committee, from 1999 to 2002, jury protection was applied in around four to five trials per year on average by the Metropolitan Police Service.⁴⁴ Therefore, the amount of jury protection by police against jury tampering is not so extensive, but definitely there is the demand for jury protection.

³⁹ Such a nonsense happened in the second and third trial of *R v Twomey and others* [2009] EWCA Crim 1035, [2010] 1 WLR 630, [2011] EWCA Crim 8.

⁴⁰ See *R v Comerford* (n 23) 236

⁴¹ Ibid 240

⁴² Ibid 242

⁴³ Ibid 241

⁴⁴ See *Criminal Justice Bill Second Report of Session 2002-2003* (n 12) Ev 18

According to the Home Affairs Committee, there are two kinds of jury protection by the Metropolitan Police Service.⁴⁵ The first type, is the jury protection for twenty-four hours every day with seventy-two constables and three sergeants.⁴⁶ On average, the total length of this kind of protection was eighty-three days in the financial years 2000-2001.⁴⁷ There were five cases of this level of jury protection by the Metropolitan Police Service in 2000 and four cases in 2001.⁴⁸ This strict and significant type of jury protection has been provided only by the Metropolitan Police Service in the United Kingdom according to the Home Office Committee.⁴⁹ Hence, the Home Office Committee made it clear how the problem of jury tampering in London is noticeable.⁵⁰ The second type of the jury protection by police is the shuttle service from the court to each juror's house and back or any specified meeting points.⁵¹

The police protection for jurors has been placed as a traditional treatment by the court to protect jurors from any tampering in the contemporary English legal history. The Home Affairs Committee has pointed out, nobody knows whether the police protection efficiently worked or not and it involves several controversial factors.⁵²

⁴⁵ See *Criminal Justice Bill Second Report of Session 2002-2003* (n 12) Ev 18

⁴⁶ Ibid, Ev 18, 34 and 82

⁴⁷ Ibid, Ev 18

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Unfortunately, the number of this sort of jury protection has not been released since it was so few as to negligible. Ibid

⁵² Ibid, Ev 14

Firstly, vast amount of money is required to carry out jury protection by police. Although, the amount of jury tampering cases is few, Ian Blair maintained at the Home Affairs Committee in November 2002 that the cost for jury protection is a major problem to actually protect a jury.⁵³ According to Zander, police protection for jurors is extremely expensive.⁵⁴ The Metropolitan Police Service had spent around £9 million from 2000-2002 on jury protection.⁵⁵ According to the Home Office Committee, the cost is equal to 130 police officers on the streets of London on annual basis.⁵⁶ Hence, it is obvious that there needs for the Government to prepare a large budget allocated to protect the jury. Nevertheless, in the House of Lords when the enactment of the Criminal Justice Act 2003 was discussed, there were the peers who argued that the costs for jury protection need to be acceptable since it is necessary and the amount is very small.⁵⁷ They are rarely easy to definitively conclude that this amount of money is a waste of the tax payer's money. It is clear that the budget for the jury protection by the Metropolitan Police Service is substantial.

Secondly, there are some criticisms of jury protection by police that it is annoyingly burdensome to a juror.⁵⁸ Blair New Labour Government stated that,

⁵³ See *Criminal Justice Bill Second Report of Session 2002-2003* (n 12)

⁵⁴ See Michael Zander, *Cases and Materials on the English Legal System* (10th edition, Cambridge University Press, 2007) 548

⁵⁵ See Ward and Davies (n 11) and *Criminal Justice Bill Second Report of Session 2002-2003* (n 12) Ev 18

⁵⁶ See *Criminal Justice Bill Second Report of Session 2002-2003* (n 12) Ev 18

⁵⁷ For instance, a Labour Lord Helena Ann Kennedy. See House of Lords, *Debate*, 15 July 2003, vol 651, col 783

⁵⁸ See House of Commons, 'Explanatory Notes on Criminal Justice Bill' (2002) Section 31 <<http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmbills/008/en/03008x-.htm>> accessed 8 March 2015; *Criminal Justice Bill Second Report of Session 2002-2003* (n 12) Ev 82

if the trials continue over a couple of months, jury protection by police “would be extremely disruptive and an unreasonable intrusion on the lives of individual jurors.”⁵⁹ In addition, jury protection can be assumed as a mean for police to monitor each juror and their family members’ actions and movements.⁶⁰ It is true that police will monitor the daily life of jurors and their families during the course of the protection for a certain length of time, regardless of whether it is looked upon positively or negatively. Therefore, it will definitely be unusual and will be possibly uncomfortable for each juror and their family who are being protected.

The Government and the judiciary understand that jury protection by police disturbs juries and their families’ daily life. For instance, Auld has pointed out that, “It is an interruption of the normal rhythm of their lives, causing variously inconvenience, disruption of their family and/or working routines, and financial loss.”⁶¹ The Court of Appeal reasonably suggested that, jury protection by a police should be considered “in the context of both the burdens on the jury of any necessary protection, and its impact on the public, both in terms of cost and of the inevitably significant drain on police resources.”⁶²

As Zander has pointed out, police protection for jurors is also “extremely costly and burdensome for police, such protection needs to continue over a period of

⁵⁹ See *Justice for All* (n 15) 75

⁶⁰ The Court of Appeal also shows its concern with this sort of monitoring a jury. See *R v J, S and M* [2010] EWCA Crim 1755, [2011] 1 Cr App R 5, 45

⁶¹ *Auld Report* (n 2)

⁶² *R v J, S and M* (n 60) 44

months.”⁶³ Therefore, the statement by Lloyd-Bostock and Thomas, “the main justification put forward for limiting the right to jury trial is that jury trials are expensive and time consuming,”⁶⁴ cannot be denied completely.

Thirdly, whether such a special treatment makes a jury create a prejudice for the defendant and influences their verdicts. If the second summoned jury in a case is informed by the trial judge that police will escort and protect them and their families from now on for a certain length of time during the trial because there is an evidence of jury tampering or attempt of jury tampering in the trial by the first summoned jurors, the second summoned jurors will definitely be nervous and probably confused. In addition, once the second summoned jurors know that the defendant’s side had approached their predecessors, it is difficult to avoid that the jurors will get a certain negative image of the defendant which will eventually result in creating a prejudice in the juror’s mind.

In *R v Comerford*, the judge understood that it will prejudice the jurors against the defendants, if the reasons for the police protection were clearly given to the jurors.⁶⁵ Therefore, the judge denied the necessity for informing the jury about the reason for the jury protection. In the jury trial of *R v Dodd and Others*,⁶⁶ the trial judge of the Central Criminal Court argues to the jury why they would need to use police during the trial:

⁶³ Zander (n 54)

⁶⁴ Sally Lloyd-Bostock and Cheryl Thomas, ‘Decline of the ‘Little parliament’ (1999) 62(2) Law and Contemporary Problems 7, 17

⁶⁵ *R v Comerford* (n 23) 241

⁶⁶ *R v Dodd and Others* [1981] 74 Cr App R 50

*What I was proposing to say was this: during the course of this trial you will be under the surveillance of police officers when you are not in court. These officers have no connection with this trial. This is just a precaution. You should not be alarmed. It is a precaution that is taken from time to time and by no means does it follow that anything untoward will happen to any of you. Most importantly, you must not allow this fact in any way to influence your decision in the trial, which decision you will take upon the evidence and upon nothing else. In particular, do not allow yourselves to be biased in any way against any of these three defendants by reason of the precautions that are being taken. And then I was proposing to tell the jury that further details of procedure would be given to them in due course.*⁶⁷

The Lord Judge O'Connor of the Court of Appeal concurred with this judge's statement in *R v Ling*⁶⁸ as "What the judge said in this case was short, simple and sufficient, and not open to any possible objection."⁶⁹ Although the judge of the Court of Appeal stated that "The practice is to warn the jury in very clear terms that they must not in any way hold it against the defendant that such measures have been taken,"⁷⁰ there is a question which remains; what kind of sentence is 'very clear terms?' By what grounds, can the judge have such high level of confidence in his sentences?

⁶⁷ The statement was asserted from the original transcript of *R v Ling* [1986] Cr LR 495. See also *R v Dodd and Others* (n 66) 51 and 53

⁶⁸ Ibid

⁶⁹ Ibid

⁷⁰ In the case, the judge continues like "Such a warning was given in this case, and no compliant is made that it was in any way inadequate." Moreover, "We have no reason to doubt that the jury paid proper attention to the warning given." See *R v Comerford* (n 23) 241

In *R v J, S and M*,⁷¹ the similar concern was discussed. The trial judge in the case had struggled since the jury protection because it would be realised by the jurors that they were being made the unusual protective measures, although he ordered the jury protection by police for two weeks.⁷² The judge suspected that if the jurors realise the reason for the protection by police was tampering of themselves, it will be impossible for the jury to evaluate the defendant and reach the verdicts of the case objectively.⁷³ This consideration eventually made the trial judge terminate the jury protection by police, discharge the jurors, then use a non-jury trial which was introduced since the Criminal Justice Act 2003. It is peculiar that court is so concerned about whether the jury will realise the existence of jury tampering or not. Realistically, it is difficult to predict that the jurors will not realise the reason for the jury protection. Therefore, probably, as Taylor has correctly pointed out, “If there is a risk, real or apparent, of jury bias, then the trial should not proceed to verdict.”⁷⁴

Finally, in relation to a basic difficulty in solving the jury tampering problem, it needs to be mentioned that finding the evidence or attempt of jury tampering which is necessary to direct the police protection for the jury is difficult.

According to the Home Affairs Committee, unless there is some evidence of

⁷¹ *R v J, S and M* (n 60)

⁷² The judgment stated that the jury protection by a police was “probably even more stringent security arrangements than those which were envisaged for the fraud trial.”

Ibid
⁷³ Ibid 44

⁷⁴ Nick Taylor, ‘Case Comment *R v S*’ (2010) Criminal Law Review 643, 646

jury tampering, the court cannot order jury protection.⁷⁵ How to find the evidence of jury tampering is one of the significant tasks for the court.

Although there are these complex factors of jury protection by police, the police protection for a jury was one of the best judicial treatments for the court to assure the fairness and efficiency of jury trials in the same manner as discharging the approached jurors until a non-jury criminal trial by Section 44 of the Criminal Justice Act 2003 was introduced. At the recent case, the jury of the Mark Duggan trial were threatened and chased from the courtroom. The court put them under special police protection.⁷⁶

To sum up this section, the words of William Hughes will be asserted from these that appears in his Memorandum to the House of Commons Home Affairs Committee; police protection for jury “should not be regarded as a panacea.”⁷⁷

⁷⁵ See House of Commons Home Affairs Committee, *Criminal Justice Bill Second Report of Session 2002-2003* (n 12)

⁷⁶ See John Simpson and Sean O’Neill, ‘Duggan jury given special protection after threats’ *The Times* (London, 10 January 2014)

⁷⁷ *Criminal Justice Bill Second Report of Session 2002-2003* (n 12) Ev 82. William Hughes was the Director General of the National Crime Squad at the time.

c.) Non-jury trial and the Criminal Justice Act 2003, Part 7

i.) Brief background of the sections on jury tampering of the Criminal Justice Act 2003, Part 7

The introduction of a non-jury criminal trial is placed as a historic event on the English legal history. The reason why a non-jury criminal trial was established is because the existing legal frameworks and judicial attempts had not worked well enough to solve the jury tampering problem, especially from the early 1980s, the time when there had been an ‘outbreak’ of jury tampering. For instance, according to *The Economist*, in 1981 alone, there were thirteen cases of jury tampering at the Central Criminal Court.⁷⁸ Although it was indicated as the flow of jury tampering as an ‘outbreak,’ the number of jury tampering cases was relatively few.⁷⁹ However, jury tampering was absolutely something pointing to very serious problems.⁸⁰ As an early example of the outbreak, in *R v Dodd and Others*, police submitted evidence that the defendant’s side attempted to bribe a total of £30,000 to the jurors to acquit.⁸¹

In addition, a much worse is that there was a case in which jury intimidation worked very effectively without any attempts to stop its influence to the verdict and the defendant got an acquittal in July 1999. Three jurors in a trial in the west Midlands were threatened on the way from the court to their houses, and the

⁷⁸ See *The Economist* (n 3)

⁷⁹ See Richard Taylor, Martin Wasik and Rodger Leng, *The Criminal Justice Act 2003* (1st edition, Oxford University Press, 2004) 57

⁸⁰ Ibid

⁸¹ See *R v Dodd and Others* (n 66) 53

foreman was threatened by a man who gestured to shoot him.⁸² Nonetheless, the defendant was acquitted by the jurors and the judge affirmed their verdicts.⁸³ The reason for the judgment is because the evidence of jury tampering and the tampering of the verdict could not be discovered and proved well enough by the prosecutor. It was same in the *R v Martin*, and the claim of the jury intimidation was not affirmed finally after the investigation by the Lord Chancellor's Department since the evidence of jury intimidation was not found.⁸⁴

The level of intimidation has become vicious. For instance, in autumn 2001, the jurors in a trial at Kingston Crown Court suffered from having paint stripper sprayed on their cars, therefore, the jury was discharged and a special protection was provided for the retrial jury.⁸⁵ Jury bribery also has not stopped in the 2000s.⁸⁶

The Government gradually started to consider the criminal jury reform instead of high cost and complex police protection process. The Government declares "Any change in the law must enhance the criminal justice system and not undermine a principle of confidentiality of the jury room that has long been seen

⁸² See House of Lords *Debate* 19 November 2003, vol 654, col 1964

⁸³ Ibid

⁸⁴ See *R v Martin* (n 8)

⁸⁵ See House of Lords (n 82)

⁸⁶ For instance, in August 2002, a trial on serious drug offences collapsed due to jury tampering at Liverpool Crown Court. Two jurors were intimidated and another juror was offered £10,000 as a bribe to give an acquittal verdict. The trial eventually cost more than £1 million. In addition, in the autumn 2002, a juror in a trial at Leeds Crown Court was approached by telephone call and offered £10,000 if he followed the briber's direction, otherwise, his and his family's safety were threatened. Ibid col 1963

as essential to the effective and fair administration of justice.”⁸⁷ It was the time to ‘enhance the criminal justice system.’

In response to this outbreak of jury tampering since the 1980s to the 2000s, it was necessary for the Government to prepare the new Criminal Justice Bill which would give a vital wound to any attempts of jury tampering. For example, in Parliamentary debate on the new Criminal Justice Bill at the House of Commons in 2002, it was stated that “alternatively (or additionally), the court must be satisfied that the risk of jury tampering would remain sufficiently high notwithstanding any steps (including police protection) that could reasonably be taken to prevent it, to make it necessary in the interests of justice for the trial to be conducted without a jury.”⁸⁸ This theory would result in the enactment of the Criminal Justice Act 2003.

A historic restriction for the criminal jury system culminates in the Criminal Justice Act 2003, Part 7. The Act removes the opportunity of trial by jury for cases involving complex fraud or jury tampering and introduces a non-jury criminal trial. Therefore, the reform involved active political debate in Parliament and also produced serious conflicts among the legal practitioners and academic commentators. According to Ward and Davies, introducing a non-jury trial in the Crown Court was the most politically charged part of the Criminal Justice Act 2003.⁸⁹

⁸⁷ Department for Constitutional Affairs, *Jury Research and Impropriety* (1st edition, Consultation Paper CP04/05, 2005) 16

⁸⁸ House of Commons (n 58)

⁸⁹ See Ward and Davies (n 11) 73

The basic design of the Criminal Justice Act 2003 was established by the Auld Commission. The Auld Commission published the *Review of the Criminal Courts of England and Wales* in 2001.⁹⁰ In the report, the Committee argues on the necessity for a non-jury criminal trial in a case of jury tampering. Proceeding this, the Government published a *White Paper, Justice for All*, in 2002 which “aims to rebalance the system in favor of victims, witnesses and communities and to deliver justice for all, by building greater trust and credibility.”⁹¹ The White Paper absolutely represents the Blair New Labour administration’s perspective to modernise and reform the English criminal justice system.⁹² *Justice for All* proposed a non-jury criminal trial to prevent any sort of jury tampering.⁹³ The White Paper suggests that even if there was an attempt to influence the jury, and eventually the trial was stopped, the judge has the power to continue the trial without jury.⁹⁴

Looking back at the formidable outbreak of jury tampering since the 1980s, this logic absolutely is reasonable. In the Memorandum to the House of Commons Home Affairs Committee, Hughes said that, “It is hoped that any legislation arising from this consultative process will possess the credibility to sustain radical criminal justice reform which we believe is necessary in the fight against organised crime.”⁹⁵ The White Paper *Justice for All* does not mention any

⁹⁰ See *Auld Report* (n 2)

⁹¹ *Justice for All* (n 15) Foreword

⁹² Ibid

⁹³ Ibid 68

⁹⁴ Ibid 75

⁹⁵ *Criminal Justice Bill Second Report of Session 2002-2003* (n 12) Ev 81

statistic evidence of the increase in jury tampering.⁹⁶ This point was subject to criticisms by the legal practitioners and academic commentators.

Unlike the criticism from the English legal society, the police officials strongly supported that criminal justice reform. As a positive reaction, for instance, Ian Blair believes that “Far from diluting a fundamental principle of the legal system, these proposals will protect its integrity in those small, but increasing number of cases and will preserve the wider principles of justice in this country.”⁹⁷ In another instance, the Metropolitan Police Service submitted the Memorandum to the House of Commons Home Affairs Committee which stated that its strong support for the plan which introduced a non-jury criminal trial in a case of jury tampering.⁹⁸ These police officials’ significant requests were achieved by the enactment of Section 44 of the Criminal Justice Act 2003. It is natural for police to support a non-jury criminal trial because of their burden when they are protecting jurors, especially in terms of the cost performance. Therefore, according to Bailey et al., the introduction of a non-jury trial by the Criminal Justice Act 2003 is “not based on principle but rather on administrative efficiency.”⁹⁹ It cannot be denied completely.

⁹⁶ See Richard Ward and Amanada Akhtar, *English Legal System* (10th edition, Oxford University Press, 2008) 625

⁹⁷ Blair (n 6)

⁹⁸ See *Criminal Justice Bill Second Report of Session 2002-2003* (n 12) Ev 78. Ian Blair stated that, “Chief constables have therefore today written a letter to members of both Houses of Parliament stating their support for those provisions of the Criminal Justice Bill which will permit a judge to hear a case without a jury in the face of a realistic threat of intimidation.” See also Blair (n 6)

⁹⁹ Stephen Bailey, Jane Ching and Nick Taylor, *The Modern English Legal System* (5th edition, Sweet & Maxwell, 2007) 1104. They have also pointed out that “Many of the changes implemented to the criminal process in the last decade (1990s) in particular have been directed towards improving efficiency in the system.” Ibid 1106

ii) Analysis of the sections of the Criminal Justice Act 2003, Part 7 on jury tampering

By such a background, Section 44 of the Criminal Justice Act 2003, which introduces trial without jury¹⁰⁰ in the case where any risk of jury tampering was found, was enacted and successfully enforced in 2007 unlike Section 43.¹⁰¹

To be conducted only by a judge, the two conditions which are outlined in Section 44, must be fulfilled.¹⁰² Firstly, there need to be “evidence of a real and present danger that jury tampering would take place.”¹⁰³ Secondly, “notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering,”¹⁰⁴ there need to be “the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.”¹⁰⁵

In addition, Section 46 of the Criminal Justice Act 2003 provides the necessary steps for a trial judge who seeks to discharge the jury because of the appearance

¹⁰⁰ See Section 44(2) of the Criminal Justice Act 2003

¹⁰¹ Section 43 of the Criminal Justice Act 2003 provides the fraud trial by judge alone in certain cases. The enforcement of the Section was defeated in the House of Lords in March 2007. See the later sections of this thesis.

¹⁰² Ibid Section 44(3). The Section clearly provides that if the two conditions in Section 44(4) and (5) are not fulfilled, the judge will need to reject the application of a non-jury criminal trial.

¹⁰³ Ibid Section 44(4). The examples of the situations “where there may be evidence of a real and present danger that jury tampering would take place” were clarified in Section 44(6).

¹⁰⁴ Ibid Section 44(5)

¹⁰⁵ Ibid

of jury tampering. Before the discharge, a trial judge must take three steps specifically. Firstly, the judge must “inform the parties that he is minded to discharge the jury.”¹⁰⁶ Secondly, the judge must “inform the parties of the grounds on which he is so minded.”¹⁰⁷ Thirdly, the judge must “allow the parties an opportunity to make representations.”¹⁰⁸ Once these three conditions are fulfilled, the judge will discharge the jury and continue the case without jury only if he or she is satisfied of the existence of jury tampering¹⁰⁹ and convinced of fairness for the defendant if the trial is continued without jury.¹¹⁰

As another choice for the judge after the discharge of a jury, he or she can terminate the trial “if it is necessary in the interests of justice”¹¹¹ and start a new trial without jury in the case that the two condition of Section 44(4) and (5) were “likely to be fulfilled.”¹¹²

In a non-jury criminal trial which is by the Criminal Justice Act 2003, the judge will assume the jury’s first function: deciding the facts on the case. Specifically, Section 48(3) of the Criminal Justice Act 2003 prescribes, once a trial has been continued or restarted as a non-jury criminal trial, the judge will perform all the functions which a jury would have exercised; determining any questions, and making any findings.¹¹³ A big difference between jury trial and judge-only trial

¹⁰⁶ Section 46(2)(a) of the Criminal Justice Act 2003

¹⁰⁷ Ibid Section 46(2)(b)

¹⁰⁸ Ibid Section 46(2)(c)

¹⁰⁹ Ibid Section 46(3)(a)

¹¹⁰ Ibid Section 46(3)(b)

¹¹¹ Ibid Section 46(4)

¹¹² Ibid Section 46(5)

¹¹³ Ibid Section 48(3)

is giving the reasons for the verdict. For their judgment, jurors do not need to argue any reasons. Section 48(5)(a) of the Criminal Justice Act 2003 stated that “The court must give a judgment which states the reasons for the conviction at, or soon as reasonably practicable after, the time of the conviction.”¹¹⁴ Another difference would be that the judge will be able to address all the witness statements in a non-jury criminal trial unlike juries. Including this point, introducing a non-jury criminal trial caused strong oppositions from the legal practitioners and academic commentators.¹¹⁵

On the contrary to this flow of the criticisms, Section 44 of the Criminal Justice Act 2003 has not been altered after the Labour Government was defeated in the last general election in 2010, and there is no plan to revise Section 44 of the Criminal Justice Act 2003 under the current coalition Government’s policy schedule.¹¹⁶ According to Lord Falconer, the introduction of a non-jury trial in a case of jury tampering is in the course of the English jury reform for “maintaining the confidence of jurors and the public in the fairness of the criminal justice system.”¹¹⁷ Same as the previous Labour Government, the current coalition Government and the position of the court trust the efficiency of Section 44 and the aptitude of a non-jury criminal trial against jury tampering.

¹¹⁴ Section 48(5)(a) of the Criminal Justice Act 2003

¹¹⁵ For example, see Taylor et al. (n 79) 53

¹¹⁶ Joint Committee of Human Rights, ‘Oral Evidence’ (16 November 2010) <<http://www.publications.parliament.uk/pa/jt/jtrights.htm>> accessed 8 March 2015, see the answer by Kenneth Clarke MP, the Lord Chancellor to the Question 29

¹¹⁷ Department for Constitutional Affairs (n 87) 4

iii) Non-jury criminal trial cases

R v Twomey and others

Since Section 44 of the Criminal Justice Act 2003 was enforced in 2007, the first non-jury trial was judged in the spring of 2010. It was *R v Twomey and others* which has been called the ‘Heathrow Robbery Case.’¹¹⁸ The case was a historic landmark case in the English legal history since it was the first judge-only criminal trial without any jurors in England after the Star Chamber was abolished in 1641. In addition, the case raised several controversial factors regarding a non-jury criminal trial.

In the case, the four defendants were accused of robbery with firearms and of stealing £1.75 million from a warehouse at the Heathrow Airport in February 2004.¹¹⁹ The judgment stated that the offense was “a carefully planned and professionally executed armed robbery.”¹²⁰ The four defendants all denied the charges of the offenses.

The unprecedented incidences of the case are that in total, three trials and three different juries for each trial were summoned for the case. This was because of the discharge of the jurors by the judge who found jury tampering by the defendants. In other words, these three trials all failed because of continual jury tampering. For instance, the reason why the jury was discharged in the second

¹¹⁸ *R v Twomey and others* (n 39)

¹¹⁹ *Ibid* 633

¹²⁰ *Ibid*

trial in 2007 was because one of jurors told that being under stress and rejected to return to court room.¹²¹ During the third trial in 2008, two jurors were approached by the defendant's side.¹²²

In addition to such a repeated fearful situation, the judge found a substantial amount of inadmissible and prejudicial materials.¹²³ Thus, the prosecution asked the judge to start the retrial by judge only.¹²⁴ Finally, after finding a real and present danger of jury tampering, the trial judge aborted the hearing then the question was sent to the presiding judge of the circuit.¹²⁵

There were two choices for the presiding judge in this case to solve the problem and protect the jury.¹²⁶ Firstly, spend more money and increase the number of police on the jury protection. Secondly, use a non-jury criminal trial which has been made law under Section 44 of the Criminal Justice Act 2003. In the former choice, there was a problem of the cost. Police argued that if the court held another jury trial, it would have cost up to £6 million, and require up to eighty-two police officers to protect the jurors from any tampering.¹²⁷ Conversely, according to Pattenden, if the fourth trial was organised with the judge only without any jurors, it would cost £1.5 million.¹²⁸

¹²¹ See Pattenden (n 16)

¹²² Ibid

¹²³ See *R v Twomey and others* (n 39) 633

¹²⁴ See Pattenden (n 16) 355-56

¹²⁵ Ibid

¹²⁶ See *R v Twomey and others* (n 39) 634

¹²⁷ Ibid

¹²⁸ See Pattenden (n 16) 356

Moreover, since the judge found evidence of ‘a real and present danger’ which was stipulated in Section 44 of the Criminal Justice Act 2003 as a condition of the application of a non-jury criminal trial, he decided to order a judge only trial without any jurors. On 18 June 2009, the Court of Appeal permitted the fourth trial to be judged as a non-jury criminal trial by Section 44 of the Criminal Justice Act 2003. The judge of the Court of Appeal states that “The danger of jury tampering and the subversion of the process of trial by jury is very significant.”¹²⁹ The judge also questioned the aptitude of the jury protection by police in the case in terms of the efficacy and cost performance.¹³⁰

Following the decision of the Court of Appeal, the fourth trial of *R v Twomey and others* was heard at the Central Criminal Court as a non-jury trial. The judgment of the trial without jury was decided on the 31 March 2010, and the verdicts for all the four of the defendants were guilty. The defendants complained that organising a non-jury criminal trial in the case was inappropriate and unfair since there was no evidence to testify to the existence of jury tampering. The presiding judge did not show any evidence of jury tampering to the defendant as he deemed it inappropriate for “public interest immunity” grounds,¹³¹ although he argued detailed reasons why he assumed that a non-jury criminal trial was the best solution in the case.¹³² The appeal of

¹²⁹ *R v Twomey and others* (n 39) 642

¹³⁰ Ibid 643

¹³¹ Ibid 631. The Court of Appeal holds that “The evidence demonstrating the risk of jury-tampering should be disclosed to the fullest extent possible but there would be cases, such as the instant case, where that evidence would be so sensitive that it could only be addressed under public interest immunity principles.”

¹³² See Pattenden (n 16) 356

the defendants was dismissed at the final judgment of the case at the Court of Appeal.¹³³

In the view of the judge of the Court of Appeal, a non-jury trial and the verdict by the judge only is a “stark”¹³⁴ but “fair”¹³⁵ system. Furthermore, the judge of the Court of Appeal states that “If criminals choose to subvert or attempt to subvert the process of trial by jury they have no justified complaint if they are deprived of it.”¹³⁶ To assure a fair trial and eliminate the rights to trial by jury from the defendants, the court should have explained more about the evidence of jury tampering in that case.¹³⁷

Eventually, the Court of Appeal affirmed the aptitude of a non-jury criminal trial in this case. Therefore, the long lasting trial was ended. After the Court of Appeal gave the first decision to use a non-jury criminal trial in *R v Twomey and others*, David Howarth, the Shadow Justice Secretary of the Liberal Democratic Party at the time, criticises the decision by arguing that the Court of Appeal avoided the jury trial because of the cost of providing adequate police protection.¹³⁸ He adds “surely the best way to protect a jury is to arrest those

¹³³ See *R v Twomey and others* (n 39) 1701

¹³⁴ Ibid 1684

¹³⁵ Ibid 8

¹³⁶ Ibid

¹³⁷ On this point, Ireland also gives her concern that it will undermine the transparency of the process of the trial. See Sally Ireland, ‘Fraud (Trials Without a Jury) Bill Briefing for House of Commons Second Reading’ (2006) JUSTICE 6

¹³⁸ See Liberal Democratic Party, ‘Labour has failed to defend trial by jury—Howarth’ (2010)

<[http://www.libdems.org.uk/press_releases_detail.aspx?title=Labour has failed to defend trial by jury %E2%80%93 Howarth&pPK=fea999cc-2cde-4cb1-8528-0d5d8dac484b](http://www.libdems.org.uk/press_releases_detail.aspx?title=Labour%20has%20failed%20to%20defend%20trial%20by%20jury%20%E2%80%93%20Howarth&pPK=fea999cc-2cde-4cb1-8528-0d5d8dac484b)> accessed 8 March 2015

who are threatening it.”¹³⁹ It is, however, an unsupported view. The Court of Appeal affirmed the organisation of a non-jury criminal trials by using Section 44 of the Criminal Justice Act 2003 and this was because it was really difficult to arrest the criminals who intimidated the jurors and it would be a costly process to achieve. Therefore, Howarth’s suggestion has been seen as inappropriate in the case of *R v Twomey and others*.

On the contrary to Howarth’s criticism, Taylor supports this historic application of non-jury criminal trials by stating that “If a court were not able to remove the right to trial by jury because the evidence concerning the tampering was so sensitive and sophisticated that it could not be disclosed to the defendant, it would defeat the purpose of the legislation.”¹⁴⁰ Therefore, the decision of the presiding judge of the Court of Appeal would be appropriate in terms of that.

There is a question of why the Crown Court could not stop the jury trial before the start of the third trial. The answer to this question is in relation to the prudent attitude of the judiciary about the use of a non-jury criminal trial even now although organising a non-jury criminal trial has been made law under Section 44 of the Criminal Justice Act 2003 since 2007. In several other cases after the enforcement of Section 44 of the Criminal Justice Act 2003, the judges have shown prudent attitudes about the use of a non-jury criminal trial.

¹³⁹ Liberal Democratic Party (n 138)

¹⁴⁰ Nick Taylor, ‘Case Comment *R v T, B, C and H*’ (2010) Criminal Law Review 82, 85

R v J, S and M

After the judgment of *R v Twomey and others* was decided by a judge only without any jurors, according to Taylor, “A widely held concern is that this case represents the door being kicked open to further non-jury cases, perhaps including those of a less exceptional nature.”¹⁴¹ However, there have been less cases recently. *R v J, S and M*¹⁴² is one of a small number of remarkable cases that have involved jury tampering.

It was alleged that the defendants conspired to pervert the course of criminal justice.¹⁴³ In other words, the defendants attempted to influence some of the jurors in the case. Therefore, Sheffield Crown Court firstly put the jurors under the police protection for two weeks. After that, the trial judge affirmed the evidence of real and present danger of jury tampering which was by Section 44 of the Criminal Justice Act 2003, thus he assumed that the case needs to be decided by judge alone without jury.¹⁴⁴

The Court of Appeal denied the trial judge’s suggestion to use a non-jury trial in the case. The Court of Appeal states that “If, during the course of this, or indeed, any trial, attempts are made to tamper with the jury to the extent that the judge feels it necessary to discharge the entire jury, it should be clearly understood that the judge may continue with the trial and deliver a judgment and verdict on his

¹⁴¹ Taylor (n 140) 86

¹⁴² *R v J, S and M* (n 60)

¹⁴³ Ibid 43

¹⁴⁴ Ibid 44

own.”¹⁴⁵ At the trial, the Court of Appeal declared its cautious position of the use of a non-jury criminal trial. The judgment states that a non-jury criminal trial “remains and must remain the decision of last resort, only to be ordered when the court is sure (not that it entertains doubts, suspicions or reservations) that the statutory conditions are fulfilled.”¹⁴⁶ The Court of Appeal did not believe that this case fulfilled all the pre-conditions within Section 44 of the Criminal Justice Act 2003, therefore it accepted the appeal of the defendant, and gave no permission for organising a non-jury criminal trial.

Moreover, the Court of Appeal further says that even the police protection for the jury in this case was unreasonable since it would create some prejudices for the defendant and destroy the jury’s ability “objectively and dispassionately to dispose of the case.”¹⁴⁷ The judge of the Court of Appeal was concerned that if unnecessary and overwhelming police protection caused any prejudice on the defendant in the jurors’ minds, it would harm the fairness of the criminal jury trial. The trial judge realises this risk, therefore, the judge ordered an end to the jury protection after two weeks and decided that a non-jury trial may need to be the preferable.¹⁴⁸ This decision of the trial judge was overturned by the Court of Appeal in the end.

¹⁴⁵ *R v J, S and M* (n 60) 45

¹⁴⁶ *Ibid*

¹⁴⁷ *Ibid*

¹⁴⁸ *Ibid*

R v KS

There was another interesting case, *R v KS*¹⁴⁹ which failed to use a non-jury criminal trial and coincidentally was decided around the same time as *R v J, S and M*. In the case, the defendant was suspected of engaging in a VAT fraud.¹⁵⁰ In the trial at Birmingham Crown Court, the trial judge found “convincing”¹⁵¹ evidence of jury tampering after the jury had already retired, thus the trial judge discharged the entire jury and attempted to continue the case as a non-jury trial.¹⁵² Although the presiding judge of the Court of Appeal supported the trial judge’s decision to discharge the jury, the Court of Appeal disagreed with the trial judge’s suggestion to use a non-jury criminal trial in the case, and accepted the appeal from the defendant against the use of a non-jury criminal trial.¹⁵³ The Court of Appeal stated that the requirements of Section 44(5) of the Criminal Justice Act 2003 were not satisfied in the case.¹⁵⁴

In this case, the court apparently showed their prudent position about the use of a non-jury criminal trial in the same manner as *R v J, S and M*. Unlike *R v J, S and M*, jury protection by police was affirmed by the Court of Appeal as a

¹⁴⁹ *R v KS* [2010] EWCA Crim 1756, [2011] 1 Cr App R 6

¹⁵⁰ *Ibid* 48

¹⁵¹ *Ibid* 46. On the contrary to this, in page 49 of the judgment, the Court of Appeal denies this confidence of the trial judge as “We can detect no evidence of careful planning or the risk of careful planning to threaten, or bribe, or intimidate, or even dissuade the jury, or any juror from returning a true verdict.”

¹⁵² *Ibid* 48

¹⁵³ *Ibid*

¹⁵⁴ *Ibid* 6. The judge of the Court of Appeal states that “We underline that although the considerations identified in these two subsections are distinct, and must both be established before an order for trial by judge alone can be made, the context and nature of the threat of jury tampering falls for examination when the question arises by Section 44(5) and the reasonableness of proposed protective steps raises for consideration.”

possible and practical course in this case.¹⁵⁵ The Court of Appeal states that “The new statutory arrangements [the Criminal Justice Act 2003] do not undermine, but rather confirm, the need for the issues of jury protection to be handled in a realistic and proportionate way.”¹⁵⁶ The judgment continues that, “The necessary decisions will, of course, be made by the trial judge, but, on the material we have seen, appropriate protection for this jury would be likely to be established at a fairly low level.”¹⁵⁷ The thought of the judge is that jury protection by a police must be proportionate to the danger.¹⁵⁸ Hence, from these descriptions, it is interpreted that the court is prudent to assume jury protection by police as in *R v J, S and M*.

Another interesting point of this jury tampering case is that the jurors had regular contact with the public, including associates of the defendant during the smoking breaks of the trial.¹⁵⁹ It was absolutely an opportunity for the parties to make contact with any of the jurors. It would be the fault of the layout and design of Birmingham Crown Court as the *Runciman Report* has pointed out.¹⁶⁰ A criticism can be made that Birmingham Crown Court needed to care more about their court management.¹⁶¹ A more peculiar point is that the Court of Appeal showed an optimistic view on this. According to the Court of Appeal, this sort of opened smoking area which was shared by defendant and jurors at

¹⁵⁵ See *R v KS* (n 149) 49

¹⁵⁶ *Ibid* 6

¹⁵⁷ *Ibid*

¹⁵⁸ *Ibid* 48

¹⁵⁹ *Ibid* 6

¹⁶⁰ See *Runciman Report* (n 30)136 and 143

¹⁶¹ For instance, the Birmingham Crown Court could have prepared different smoking areas for the parties, jurors and observers without a large monetary burden.

the court was an irregular incidence.¹⁶² In addition, the Court of Appeal holds the opinion that “This is very far from the kind of case, with which each member of the court is familiar, where individual jurors were identified, and contact with them made away from the precincts of the court, or its immediate vicinity.”¹⁶³ There is a question of what kind of grounds is the basis of these optimistic views of the Court of Appeal.

R v Guthrie

*R v Guthrie*¹⁶⁴ is also a notable case as the first use of a trial judge’s power to stop the jury trial and continue the trial by judge alone without a jury which was designed in Section 46(3) of the Criminal Justice Act 2003.¹⁶⁵ In *R v Twomey and others*, the presiding judge of the Court of Appeal decided on the application of a non-jury criminal trial, in *R v Guthrie*, the Recorder (trial judge) decided on the application of her own judge only criminal trial by herself.

In this case, there was a person who regularly approached a female juror in the trial to persuade her to push for an acquittal of the defendant.¹⁶⁶ After such jury tampering had been exposed, the Recorder at London’s Wood Green Crown Court discharged the jurors and decided to continue the existing trial by the

¹⁶² See *R v KS* (n 149) 46

¹⁶³ *Ibid* 49

¹⁶⁴ *R v Guthrie* [2011] EWCA Crim 1338, [2011] 2 Cr App R 20

¹⁶⁵ See Dominic Casciani, ‘Jury ‘tampering trial’ challenged’ *BBC News* (London, 16 June 2001) <<http://www.bbc.co.uk/news/uk-13797562>> accessed 8 March 2015

¹⁶⁶ See *R v Guthrie* (n 164) 265

Recorder only.¹⁶⁷ Since there seemed to be no unfair elements for the defendants, the Court of Appeal affirmed the Recorder's "carefully structured judgments"¹⁶⁸ to sit alone. Therefore, after the first non-jury criminal trial in England since the enactment of the Criminal Justice Act 2003 took place, this decision became the first judge only trial that continued the case which was already heard by a jury.¹⁶⁹

R v Thompson

The final example of recent jury tampering cases is *R v Thompson*.¹⁷⁰ In this case, the defendant argued that the victim's brother approached several jurors in a lunch break of the trial.¹⁷¹ This also represents a problem of jury tampering which was caused by the serious carelessness of the court management and the default of the layout and design of the Crown Court which has been pointed out by the *Runciman Report*.¹⁷²

Eventually, the Court of Appeal did not find any evidence of the jurors' misconduct and irregularity, thus the court dismissed the appeal from the defendant.¹⁷³ There is a question which has remained about why the jurors and any of the relatives and friends of the parties could eat at the same canteen at the

¹⁶⁷ See *R v Guthrie* (n 164) 262; Casciani (n 165)

¹⁶⁸ *R v Guthrie* (n 164) 267

¹⁶⁹ See Casciani (n 165)

¹⁷⁰ *R v Thompson* (n 35)

¹⁷¹ *Ibid* 209

¹⁷² See *Runciman Report* (n 30) 143

¹⁷³ See *R v Thompson* (n 35) 210

Crown Court during a trial. It is significantly careless in terms of the court management.

In addition to the suspicion of jury tampering, this case has also raised the new topic of the jury's ability to do research. This topic involves the Internet and jury tampering.¹⁷⁴ In *R v Thompson*, the Internet caused the risk of jury tampering. In the judgment, the Court of Appeal states that it is necessary for a person to use the Internet in his or her daily life.¹⁷⁵ If there is no restriction on the jury's use of the Internet during the trial term or their ability to communicate with somebody else on social media, most likely a person wanting to influence the jury will have the newer technology to approach jurors and cause jury tampering. In this case, the Court of Appeal interprets the jury verdict of the case was unsafe.¹⁷⁶

¹⁷⁴ It will discuss the juror misconduct by the use of the Internet and social media in the later sections of this thesis.

¹⁷⁵ See *R v Thompson* (n 35) 205

¹⁷⁶ Ibid

2.) Efficacy and complex factors of the Criminal Justice Act 2003, Part7

Various legal frameworks and judicial attempts dealt jury tampering in the contemporary English legal history. The Criminal Justice Act 2003, Part7 was the monumental restriction on the English jury system against jury tampering. It will not be denied that the efficacy of the Act which contributes to protecting fair trials and the credibility of juries. Meanwhile, they have involved several complex factors.

a.) How can a judge discover the existence of jury tampering?

Jury tampering definitely exists and it causes several serious problems in various cases. Therefore, there have been demands for legal treatments and judicial remedies to avoid jury tampering.

The number of jury tampering case is low. In addition, although there are several cases where jury tampering is suspected, the court sometimes rejects existence of tampering because they could not find enough evidence. The lack of statistics on the amount of jury tampering is related. When the Government attempts to alter the laws on the jury system, there has always been criticism because of the lack of grounds for insisting that jury tampering exists. The criticisms tend to claim that the statistics of jury tampering are not fully calculated and disclosed.¹ For instance, in the discussion of the enactment of

¹ For example, see Nicholas Blake, 'The Case for the Jury' in Mark Findlay and Peter Duff

Section 44 of the Criminal Justice Act 2003, at the Home Affairs Committee, when Bob Russell MP, a Liberal Democrat member of the Committee, asked Ian Blair about the number of the trials which involved jury tampering, Ian Blair answered that he did not know the figure although he stated that he can “certainly find that out.”² In the same Committee, John Burbeck, the Chief Constable of Warwickshire Police, was asked about how much the cost of jury protection had increased specifically. He continued “I do not have the figures on cost [of jury protection], but it is an increasing problem.”³ These uncertain answers by the police officials caused the several criticisms. For example, at the House of Commons Second Reading on the Criminal Justice Bill in November 2002, Dominic Grieve MP, the spokesman on criminal justice of the Conservative Party at the time, stated that “Where are the cases? Where is the evidence of the cases that relate to jury tampering?”⁴

In addition, it is difficult to find evidence of tampering. Ian Blair suggested that police would provide the information on jury tampering for the judge if any jury tampering was exposed before the trial has started.⁵ Although such a communication between the Crown Court and police exists, finding the evidence of jury tampering has been difficult. There are several possible reasons of this. Firstly, the people who bribe or intimidate jurors will try not to leave any

(ed), *The Jury Under Attack* (1st edition, Butterworths, 1988) 143; Richard Ward and Amanada Akhtar, *English Legal System* (10th edition, Oxford University Press, 2008) 625

² House of Commons Home Affairs Committee, *Criminal Justice Bill Second Report of Session 2002-2003* (2002) HC 83, Ev14

³ Ibid

⁴ House of Commons, *Debate* 4 December 2002, vol 395, col 1002; House of Commons debate on the Second Reading of the Explanatory Notes to Criminal Justice Bill 2002

⁵ See House of Commons Home Affairs Committee (n 2)

evidence of such tampering. The Department for Constitutional Affairs suggests that, “Jurors sometimes have to make what may be publicly unpopular decisions on emotive cases, but if that is the right decision based on the evidence in the case then a juror should not be subjected to undue pressure to change their mind or allege that a verdict is unsafe.”⁶ This is unlikely. It is also natural to think that jurors, intimidated do not want to reveal information that they were threatened by someone else because it will involve considerable risk of disclosing such facts to the court or to police. This is especially true in the case of intimidation by organised crime groups.

Secondly, the means for a judge to discover jury tampering has not been effective. Although a judge will ask the jurors in the trial to tell him or her to report whenever the jurors were approached by anybody else in relation to the case like in *R v Martin*,⁷ the jurors will not always report punctually to the court when they are subject to tampering because they already have beneficial relationships with the offenders who approached the jurors, or they fear revenges by the offenders for revealing the tampering.

Thirdly, it is difficult for a court to grasp the movement and actions of all the related people to the jury; family, relatives and close friends. Ian Blair has pointed out that “If a juror, or a member of his or her family, were prepared to accept payment for prejudicing a trial our current protection arrangements would

⁶ Department for Constitutional Affairs, *Jury Research and Impropriety* (1st edition, Consultation Paper CP04/05, 2005) 48

⁷ See *R v Martin* [2001] EWCA Crim 2245, [2002] 1 Cr App R 27

be unlikely to identify or prevent this.”⁸ In addition, it is certain that the court must not monitor juror’s mail, telephone calls and bank accounts.⁹ In other words, it is impossible for the court to completely understand the range of the human relationships of each juror. Once these people are approached by the cunning parties, how could the court discover and testify to the existence of tampering? The clear answer is that it is difficult.

Fourthly, it requires the fully satisfied establishing the evidence to insist on the existence of jury tampering in the court. This severe requirement is all for the purpose of avoiding any unfairness in the trial. Therefore, it is predicted that the evidential material of jury tampering needs to be fully testified.¹⁰ This severe requirement is one of the possible answers to the question of why the number of jury tampering cases is unlikely despite the fact that it is such a serious problem in contemporary English society.

Well-established evidence is essential before one can testify to the existence of jury tampering, use a non-jury criminal trial, order the discharge of the jurors, or ask for the police protection of the jury.¹¹ This is all to maintain the fairness of criminal trials. It is understandable that it would be also true that this strict requirement also makes the jury tampering problem difficult to solve.

⁸ Ian Blair, ‘Moves to prevent jury tampering’ *The Times* (London, 15 July 2003)

⁹ See Blair (n 8)

¹⁰ See Section 44(4) of the Criminal Justice Act 2003

¹¹ The Department for Constitutional Affairs clearly stated that “the judge’s responsibility is to ensure a fair, independent and impartial trial and where he or she believes this is impossible then the jury must be discharged.” See Department for Constitutional Affairs (n 6)

To discover the evidence of jury tampering is a difficult task. There is a question as to whether the criterion to discover jury tampering is decided by the judge with the application of a subjective standard. Looking back at the cases and judicial attempts against jury tampering, the judges have carefully examined the facts. A judge will not use a non-jury criminal trial until he or she finds fully established evidence of tampering. In addition, there are enough clear standards which are shown in Section 44 and 46 of the Criminal Justice Act 2003. Thus, the existing judicial standard to establish the evidence of jury tampering is not subjective.

To solve these difficulties in discovering the evidence of jury tampering, the judge will need to continually ask and require the jurors to report if any of them is subject to any form of tampering during the trial. For instance, in *R v Martin*,¹² the judge asked the jurors to report whether any offenders have intimidated them during the trial process.¹³ In addition, there needs to be more means to make discovery and establishing the evidence of jury tampering easier.

b.) Has the police protection for jury been useless?

When the enactment of Section 44 of the Criminal Justice Act 2003 was discussed, Ian Blair asserts that “The police believe the only viable alternative

¹² *R v Martin* (n 7)

¹³ The *Runciman Report* suggested that the guidance to the jury “should clearly set out the steps which they should take if they feel intimidated in any way.” See Royal Commission of Criminal Justice, *Royal Commission Report on the Criminal Justice System* (Cmd 2263, 1993) 143. The so-called *Runciman Report*.

where there is a real risk of intimidation is to remove the jury and allow the judge to hear the evidence sitting alone.”¹⁴ He warns that “If the system is not improved here, we may face violent, sophisticated and organised criminals who become untouchable.”¹⁵ In other words, does introducing of a non-jury criminal trial mean the failure of the police protection for jury as an effective attempt? Actually, there were several controversies about jury protection by police. Among these controversies, the most serious one was the vast cost factor of the police protection. It moves the Government towards the introduction of a non-jury criminal trial. Therefore, in *R v Twomey and others*, the presiding judge of the Court of Appeal ordered the fourth trial as a non-jury criminal trial instead of ordering a new fourth jury trial with expensive jury protection.¹⁶ Moreover, in *R v Dodd and Others*,¹⁷ *R v Comerford*¹⁸ and *R v J, S and M*,¹⁹ the court was concerned whether the police protection would cause any prejudice against the defendant in the jurors’ minds.

If jury protection by police is not an effective solution for avoiding jury tampering and it just creates prejudices among the jurors against the defendant, the meaning of police protection will be lost. After the enforcement of Section 44 of the Criminal Justice Act 2003, police protection for the jury has been considered and affirmed by the Crown Court. For example, in *R v KS*, the jury protection by police was positively evaluated by the Court of Appeal as the

¹⁴ Blair (n 8)

¹⁵ Ibid

¹⁶ See *R v Twomey and others* [2009] EWCA Crim 1035, [2010] 1 WLR 630, [2011] EWCA Crim 8, 634

¹⁷ See *R v Dodd and Others* [1981] 74 Cr App R 50, 50

¹⁸ See *R v Comerford* [1998] 1 Cr App R 235, 241

¹⁹ See *R v J, S and M* [2010] EWCA Crim 1755, [2011] 1 Cr App R 5, 44

possible and practical way to protect jurors from jury tampering.²⁰ The Court of Appeal argues that the new sections which were provided in the Criminal Justice Act 2003 “do not undermine, but rather confirm,”²¹ the jury protection by police. Therefore, it would be possible to conclude that the police protection for the jury remains as an option to be used against jury tampering for the court although it costs a large amount of money. The enactment of Section 44 does not mean the denial of the efficacy of the traditional jury protection by police. Moreover, there is no evidence that police cannot protect jurors.

c.) Judge’s authority and ability to avoid jury tampering

The criticisms of the introduction of a non-jury criminal trial sometimes argue that the judge would need too much power in a trial without a jury.²² Whether the judge’s decision to organise a non-jury criminal trial can be efficient for solving and avoiding jury tampering would not be fully affirmed. In addition, each judge’s ability to provide an appropriate decision in the appropriate timing would influence the fate of the cases to avoid jury tampering.

A judge warns the jurors about jury tampering in a trial. For example, in *R v Martin*, the judge asked the jury to report whether they had been intimidated by somebody else during the trial process.²³ Whether the jury follows this direction

²⁰ See *R v KS* [2010] EWCA Crim 1756, [2011] 1 Cr App R 6, 49

²¹ Ibid

²² Section 48(3) of the Criminal Justice Act 2003 has recognised such power to the judge. About the criticisms, see Richard Taylor, Martin Wasik and Rodger Leng, *The Criminal Justice Act 2003* (1st edition, Oxford University Press, 2004) 53

²³ *R v Martin* (n 7)

and performs their duty to report the existence of any jury tampering is unfortunately uncertain, and sometimes less trustworthy.²⁴ Therefore, the efficiency of the judge's direction to the jury on tampering is questionable.

Sometimes, the irresolute judge failed to solve jury tampering problem in a case because he or she lost the proper timing and could not provide the appropriate decision to avoid jury tampering. Losing the proper timing would also be a problem for solving jury tampering. In *R v KS*,²⁵ the judge of the Court of Appeal sharply criticises the trial judge. Firstly, and surprisingly, totally ten trials were organised on a trial before it was brought to the Court of Appeal because the court did not suggest any jury tampering.²⁶ This means that there was a serious delay of the appropriate action to discover any jury tampering by the trial judge and the fact even makes clear that there was a serious waste of time and money. Secondly, until the Court of Appeal received the case, no jury protection by a police had been ordered from the trial judge.²⁷ Thirdly, the trial judge completely lost the opportunity for discharging the single juror, subjected to tampering. Therefore, the only choice left for the judge by that time was to eventually discharge the entire jury.²⁸

The judge will need to inform the jury of the rules which relate to jury tampering more thoroughly and require that the jurors report it if any of them are

²⁴ *R v Martin* (n 7)

²⁵ *R v KS* (n 20)

²⁶ *Ibid* 48

²⁷ *Ibid*

²⁸ *Ibid*

subjected to tampering. In addition, the judge needs to thoroughly prohibit the jury from having any contact with any person in relation to the parties involved. If the judge informs the jurors of how very serious it will be for them if they violate these rules, the jurors will be more careful with their behaviour during term of their trial. Moreover, the judge needs to argue that jurors need to reject any approach from the parties strictly. The judge's ability is closely in relation to solving the problem of jury tampering, especially after the enforcement of the Criminal Justice Act 2003.

d.) The misuse of non-jury criminal trial by the defendant

The purpose for the non-jury criminal trial is to assure the fair trial and the credibility of the English criminal justice system. Moreover, to protect the jury, who are originally lay people, from any possible risk of jury tampering. If jury tampering tends to be caused by the defendant's side, will a non-jury criminal trial always be a favourable trial system for the victim's side? The answer will be 'No,' although many criticisms have argued that the non-jury criminal trial which was introduced by Section 44 of the Criminal Justice Act 2003, will harm and eliminate the inherent right to jury trial from the defendant.²⁹ On the contrary, there is an interesting indication that jury tampering would also be a reason for the defendant to avoid jury trial or retrial. For instance, at the Second Reading of the Criminal Justice Bill at the House of Commons in November 2002, Chris Mullin MP warned that "We should scrutinise carefully whether an

²⁹ See Taylor et al. (n 22)

allegation that a jury is about to be tampered with is being used as a device for escaping jury trial.”³⁰

Moreover, before the enactment of Section 44 of the Criminal Justice Act 2003, the Government had already affirmatively predicted the need to permit defendants to exercise the right to ask for a non-jury trial in the Crown Court.³¹ Therefore, the legal framework attempts to allow the defendant to use the opportunity of a non-jury criminal trial to receive a fair and appropriate judgment. However, Section 44 of the Criminal Justice Act 2003 does not permit any misuse of the right of the defendant to use a non-jury criminal trial to avoid judgment by jury. The severe conditions of organising a non-jury criminal trial which was provided in Section 44 and 46 of the Criminal Justice Act 2003 will be the appropriate obstacle to prevent the perverse desire of the defendant to misuse a non-jury criminal trial. In addition, the judges need to understand this risk when he or she will decide on the application to organise a non-jury criminal trial. As the *Auld Report* stated that “Trial by judge alone, if defendants wish it, has a potential for providing a simpler, more efficient, fairer and more open form of procedure than is now available in many jury trials, with the added advantage of a fully reasoned judgment.”³²

³⁰ House of Commons (n 4) col 941

³¹ See Home Office, *Justice for All* (Cmd 5563, 2002) 68. The *Auld Report* also suggested that the “defendants, with the consent of the court after hearing representations from both sides, should be able to opt for trial by judge alone in all cases now tried on indictment.” See Robin Auld, *A Review of the Criminal Courts of England and Wales* (2001) Ministry of Justice 181 (The so-called *Auld Report*)

³² Ibid 180

e.) Jury tampering cases which provide the benefit for the victim's side

Jury tampering is not always caused by the defendant. It is sometimes by the victim's side. For instance, jury tampering which was seen in *R v Martin* was a tampering 'against' the defendant, not 'for' him.³³ In addition, another example can be seen in *R v Thompson*.³⁴ In that case, the victim's brother approached some jurors at the canteen of the court.³⁵ Eventually, the Court of Appeal could not find any evidence for the incidence which was raised by the defendant, thus the appeal was declined.

These cases would make the people realise that it is possible for the victim's side to influence the jury to get preferable verdicts for their side. It is natural since both parties of a trial would have a desire to get the beneficial judgment for them. Jury tampering which was caused by the defendant's side tends to be noticed more, thus people tend to forget the possibility of jury tampering which was caused by the victim's side. It needs to be recognised that the risk of jury tampering is caused by either side's parties.

f.) Jury tampering by another jury

Nobody can check the conversation among jurors in the jury deliberation room in England because of the severe restrictions against the disclosure of jury

³³ *R v Martin* (n 7)

³⁴ *R v Thompson* [2010] EWCA Crim 1623, [2011] 1 WLR 200 (CA(Crim Div)) 209, 210

³⁵ *Ibid* 209

deliberations. If some jurors took oppressive attitudes toward other gentle jurors, and led the verdicts into the dominant jurors' preferred direction, how can the court be expected to assure the fairness of the trial? In fact, in *R v Smith and Mercieca*, some unscrupulous jurors badgered, coerced and intimidated other jurors into changing their verdict towards the conviction.³⁶ The dominant jurors asked the other jurors, for example, "Do you want a re-trial at the tax payers expense?" "Even if they [the defendants] are not guilty do you really want these people to go free?" and "If they are guilty and we find them innocent they would have got away with it, but if they are innocent and we find them guilty they can always appeal."³⁷ These facts were reported by a juror via a mail to the court, therefore, the judge finally quashed the conviction verdicts.³⁸

This case indicates the risk of dominant and oppressive jurors' opinion will be easily applied. It will possibly result perverse verdicts and miscarriage of justice. The dominant jurors action in *R v Smith and Mercieca* was absolutely jury intimidation by a juror. To avoid this, ideally, foreman should keep the fair and productive discussion at the jury deliberation. However, it seems to be difficult to impose so much burden to the foreman, who is also lay person and exclude irrational jurors in every jury trial resolutely.

³⁶ See *R v Smith and Mercieca* [2005] UKHL 12 [11]

³⁷ Ibid

³⁸ Ibid [27]

g.) Court's prudent attitude about the use of non-jury criminal trial and police protection for the jury

The opponents of non-jury criminal trials which were introduced by Section 44 of the Criminal Justice Act 2003, are concerned that these trials become the typical form of English criminal trials. It is clear that the English judges tend to show their prudent attitude about the use of non-jury criminal trials at the moment.³⁹ In *R v Twomey and others*, the outcome by the judge of the Court of Appeal states that:

*For the time being, although the statutory provisions relating to trial on indictment by judge alone have been in force for some years, this case is unique, and we must hope that it will remain so. The proper operation of the criminal justice system requires that the verdicts returned by a jury, as with any other court, must be true verdicts in accordance with the evidence.*⁴⁰

As Taylor has pointed out that, “the Court of Appeal has provided some guidance within the bounds of the current legislative framework to ensure that the provisions are used in exceptional circumstances.”⁴¹ Moreover, in *R v KS*, the Court of Appeal shows its prudent attitude even about ordering police protection for a jury. The court considers that police protection for the jury needs to be ordered in “a realistic and proportionate way.”⁴² The court

³⁹ For instance, see *R v J, S and M* (n 19) 45; *R v Thompson* (n 34)

⁴⁰ *R v Twomey and others* (n 16) 1684

⁴¹ Nick Taylor, ‘Case Comment *R v T, B, C and H*’ (2010) Criminal Law Review 82, 85-86

⁴² *R v KS* (n 20)

disagreed with the necessity for jury protection in the situation of *R v KS* eventually, because they assumed that “appropriate protection for this jury would be likely to be established at a fairly low level.”⁴³ The cautious attitude of the court was clearly declared by the sentence “the proposed protective measures must be proportionate to the threat.”⁴⁴

These prudent attitudes of the court about both organising a non-jury criminal trial and police protection for the jury to keep them as a “last resort”⁴⁵ for solving jury tampering problems can be positively evaluated in terms of avoiding abuse of these means and retains the credibility of the judiciary. If the court is too cautious towards the use of a non-jury criminal trial, the purpose and meaning of Section 44 of the Criminal Justice Act 2003 and the existence of the police protection will be defeated.⁴⁶ Like in *R v Twomey and others*⁴⁷ and *R v Guthrie*,⁴⁸ once the judge has found enough evidence of jury tampering or the attempt of jury tampering, he or she needs to make the appropriate decision to use a non-jury criminal trial and the police protection for jurors without any obstinate dogmas of the ‘last resort.’⁴⁹

⁴³ *R v KS* (n 20)

⁴⁴ *Ibid* 48

⁴⁵ *R v J, S and M* (n 19) 45

⁴⁶ Taylor has pointed out same risks. See Taylor (n 41) 85

⁴⁷ *R v Twomey and others* (n 16)

⁴⁸ *R v Guthrie* [2011] EWCA Crim 1338, [2011] 2 Cr App R 20

⁴⁹ *R v J, S and M* (n 19) 45

h.) How would the court prevent ‘judge tampering’?

Even though a trial will be conducted by a judge only without jury to avoid the influence of jury tampering, there would be a question of whether the judge will not be bribed or intimidated by anyone in relation to the parties? Brooks shared such a question. He asked “Why should we think that juries— which decide verdicts by super majority vote in England and Wales— are more likely to be affected by intimidation than a single judge or a lay magistrate?”⁵⁰ Ward and Davies also ironically warns “It is to be hoped that organised criminals appreciate that Section 46 of the Criminal Justice Act 2003 is to be implemented and that there is little now to be gained by influence jurors in such circumstances— provided their attentions are not turned to the judge instead.”⁵¹

There will need to be extra expense to protect the judge from any kinds of judge tampering although this cost is not as expensive as the money for preventing the tampering of each juror. In addition, *Justice for all* suggests that, a non-jury criminal trial needs to be proceeded by a new appointed trial judge, not the same judge of the previous jury trials which was collapsed by jury tampering.⁵² This would also be a mean to protect a judge from judge tampering.

⁵⁰ Thom Brooks, ‘The Right to Trial by Jury’ (2004) 21(2) Journal of Applied Philosophy 197, 203

⁵¹ Richard Ward and Olwen Davies, *The Criminal Justice Act 2003* (1st edition, Jordans, 2004) 78

⁵² See *Justice for All* (n 31) 75

If a party attempted to achieve its ideal result, it needs to successfully intimidate three or more jurors.⁵³ However, if it was a non-jury trial, there will be only a single judge to target. Thus, although the influence of jury tampering avoided by a non-jury criminal trial, it is clear that court and police needs to take care about judge tampering.⁵⁴

⁵³ See Brooks (n 50)

⁵⁴ Witness tampering would be also added to this category.

3.) The Northern Ireland experience and lessons from the Diplock courts

The introduction of a non-jury trial by the Criminal Justice Act 2003, is assumed a historic turning point for the English jury system. It was not the first non-jury criminal trial in contemporary British legal History. Non-jury criminal trials had existed from the 1970s in Northern Ireland: these were the so-called ‘Diplock courts.’ The non-jury experiences in Northern Ireland supply us with a number of significant lessons. Therefore, in this section, non-jury criminal trials at the Diplock courts will be analysed in comparison to contemporary non-jury criminal trials in England.

Needless to say, the political and historic situation in Northern Ireland was extremely complex. When we discuss the Diplock courts, it is difficult to avoid the issue of terrorism since it is closely in relation to non-jury trials in Northern Ireland. It is not too much to say that the Diplock courts were introduced because of the complex political, ethnic, and religious conflicts in Northern Ireland.

a.) Historic Background

As Finn correctly stated that “Northern Ireland was literally in a state of constitutional crisis.”¹ It was because “Northern Ireland is not a homogeneous

¹ John Finn, *Constitutions in Crisis* (1st edition, Oxford University Press, 1991) 77

society” according to the *Gardiner Report*.² This thesis will not discuss the complexities of Northern Irish constitutional crisis, nor its criminal justice primarily. However, to understand the necessity for non-jury criminal trials in Northern Irish society from the 1970s to the 1990s, the historic background of the contemporary Northern Irish situation needs to examine briefly.

The jury system was brought to Ireland in the late twelfth century. The jury system, with the function of arbitration, was formed in the seventeenth century when the indigenous Brehon law was replaced. The jury system occupied a central part of the Irish legal system in the same way as the English common law system until partition in 1921.³ As the nationalistic movement increased in Ireland during the late nineteenth century, the controversy surrounding the jury trials grew up, including perverse verdicts by packing the jury which had sympathy for the defendants. In Northern Ireland, prejudiced jurors have always been a problem because they have mostly been Protestants against Roman Catholic and Republican defendants.⁴ In 1882, the British Government sought to pass a law to provide jury trials in Ireland in cases of political or agrarian crime by introducing a non-jury trial; however the attempt collapsed because of the outcry from the Irish Parliamentarians and judiciary.⁵ Since that time, there have been several attempts to introduce non-jury criminal trials in Northern

² Lord Gardiner, *Report of a Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland* (Cmd 5847, 1975) 4. The so-called *Gardiner Report*.

³ About the history of Irish jury system, see Steven Greer and Anthony White, *Abolishing the Diplock courts* (1st edition, The Cobden Trust, 1986) 3

⁴ It is mainly because the jury list was restricted to property owners in Ireland who are mostly Protestants in Northern Ireland. See Kevin Boyle, Tom Hadden and Paddy Hillyard, *Law and State* (Case edition, Martin Robertson, 1975) 175

⁵ Ibid 175-176

Ireland to guard against perverse verdicts which were not realised by establishing the Diplock courts.⁶

From 1921, Ireland has been divided into two parts; Northern Ireland which is a part of the United Kingdom, and the Republic of Ireland. Northern Ireland had a regional Parliament at Stormont⁷ by the Civil Authorities (Special Powers) Act (Northern Ireland) 1922. The Act provided ‘emergency’ measures in Northern Ireland.⁸ Although it stated that ‘emergency,’ in fact, it became an almost “permanent feature of the legal system”⁹ according to Harvey. From the early 1960s, the civil rights movement arose in Northern Ireland, influenced by the American civil rights movement. One of the significant objectives of the civil rights activists was to replacement of the emergency measures.¹⁰

Moreover, from the establishing the Stormont Parliament, the continual menace for the British Government was the IRA. From the 1920s to the 1950s, the IRA repeatedly engaged in violent campaigns against the Stormont Parliament and the British Government.¹¹ On 12 December 1956, the IRA formally declared war against the “Northern Irish State.”¹² The British Government had never showed any compromise attitude towards the peaceful civil rights movement

⁶ For example, The Prevention of Crime (Ireland) Act 1882 and the Criminal Procedure Act (Northern Ireland) 1922 attempted non-jury trials for certain offences by collegiate courts composed of three judges. They were not enforced. See Greer and White (n 3)

⁷ The so-called Stormont Parliament

⁸ It included internments without trial since August 1971.

⁹ Richard Harvey, *Diplock and the assault on civil liberties* (1st edition, Haldane Society of Socialist Lawyers, 1980) 4

¹⁰ The movement was obviously started from the Roman Catholic people in Northern Ireland. See Greer and White (n 3)

¹¹ See Finn (n 1) 52-53 and 55

¹² Ibid 53

and the violent IRA. Sometimes they sent their troops Northern Ireland and increased direct control on the local security forces.¹³ The British military intervention did not succeed.

In the early 1970s, violence and terrorism in Northern Ireland were real threats and constitutional crisis over the Stormont Parliament and the British Government.¹⁴ The violence in Northern Ireland especially became worse after the 'Bloody Sunday' at Derry (Londonderry) on 29 January 1972. Both the national and international concerns over the Northern Ireland situation increased, and a new efficient solution for the crisis was expected.¹⁵ The Heath Government in Westminster accepted the resignation of Northern Irish cabinet and dissolved the Stormont Parliament in March 1972,¹⁶ at that time, direct control of Northern Irish affairs by the British Government started.¹⁷ The British Government firstly emphasised military control in Northern Ireland. Military control gradually shifted to judicial measures to control the area.¹⁸ During this movement, the Diplock Commission was appointed by the British Government in 1972.

The Diplock Commission was appointed to consider "what arrangements for the administration of justice in Northern Ireland could be made in order to deal

¹³ For instance, the British Army was sent to Derry in August 1969.

¹⁴ See Finn (n 1)

¹⁵ See Greer and White (n 3)

¹⁶ Ibid

¹⁷ Ibid. This is "apart from a brief period of devolved power-sharing Government from June 1973 to May 1974."

¹⁸ See Dermot Walsh, *The use and Abuse of Emergency Legislation in Northern Ireland* (1st edition, The Cobden Trust, 1983) 10

more effectively with terrorist organisations by bringing to book, other than by internment by the Executive, individuals involved in terrorist activities, particularly these who plan and direct, but do not necessarily take part in, terrorist acts; and to make recommendations.”¹⁹ The Diplock Commission found that Northern Irish criminal justice system had been unable to work efficiently with offences on terrorism.²⁰

In addition to the fear of terrorism, jury tampering had been a significant problem in Northern Irish society. According to the Diplock Commission, jury tampering was serious, particularly in the Catholic areas in the trial of Republican terrorists, and the Diplock Commission had “ample evidence.”²¹ The *Diplock Report* has pointed out that, “because of the way in which ‘Catholics’ and ‘Protestants’ are concentrated geographically this results in it being composed predominantly of ‘Protestants’, of whom the great majority have Loyalist sympathies.”²² Moreover, the possibility of being a juror among Protestants is much larger than the Catholics’²³ because of the property

¹⁹ Lord Diplock, *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland* (Cmd 5185, 1972) 1. The so-called *Diplock Report*.

²⁰ Ibid 85. According to Boyle et al., the Diplock Commission engaged their survey based “almost exclusively on the views of the prosecuting authorities and the security forces.” See Boyle et al. (n 4) 95. The authors continued that “No evidence was received either from the Northern Ireland judges or those practising in the courts, or from the public and their representatives.” Lord Diplock stated that “In fact we have received only three written representations. The bulk of our evidence has been oral and was taken from people with responsibility for the administration of justice in Northern Ireland, but we have also heard from representatives of the Civil and Armed Services.” Ibid. The report also mentions only Lord Diplock visited Northern Ireland twice for two days each in the survey by the Diplock Commission, and he met members of the security forces on the ground. Ibid 1-2

²¹ Ibid 17

²² Ibid

²³ According to the Diplock Commission, it is two to one. Ibid

qualification for jury service. Therefore, the *Diplock Report* concluded that “the result of all these factors is that juries who have tried Republican terrorists, who until recently have been almost the only detected perpetrators of terrorist crimes, have been juries the great majority, if not all, of whom have been Protestants.”²⁴ According to Boyle et al., in the 1970s, “as more and more Protestants began to come before the courts for serious offences,”²⁵ the risk of jury tampering increased. Jury tampering in Northern Ireland did not expand, but it was even “well founded.”²⁶ The family and relatives of jurors were also targets, and sometimes they were kidnapped by associates of the defendant.²⁷ Jury intimidation in Northern Ireland was effective for achieving the offender’s wish. According to the *Baker report*, “not only the fear but the knowledge that threats of violence or torture will be carried out will deter even the most resolute.”²⁸

The *Diplock Report* stated that “A frightened juror is a bad juror even though his own safety and that of his family may not actually be at risk.”²⁹ The prime concern of jury tampering was “borne out by perverse verdicts, where juries allowed seemingly guilty individuals to go free.”³⁰ In addition, according to the *Diplock Report*, there was no efficient safeguard in a jury trial against the danger

²⁴ *Diplock Report* (n 19) 17

²⁵ Boyle et al. (n 4) 91

²⁶ *Diplock Report* (n 19) 3

²⁷ George Baker, *Review of the operation of the Northern Ireland (Emergency Provisions) Act 1978* (Cmd 9222, 1984) 30. The so-called *Baker Report*.

²⁸ *Ibid*

²⁹ *Diplock Report* (n 4) 17

³⁰ Laura Donohue, *The Cost of Counterterrorism* (Reprinted edition, Cambridge University Press, 2008) 44. Jackson and Doran indicated jury tampering and perverse acquittal as “the twin problems” in Northern Ireland. See John Jackson and Sean Doran, *Judge without jury* (Reprinted edition, Clarendon Press, 2003) 16

of perverse verdicts.³¹ Therefore, the *Diplock Report* suggests that, “We think that matters have now reached a stage in Northern Ireland at which it would not be safe to continue to rely upon methods hitherto used for securing impartial trial by a jury of terrorist crimes, particularly if the trend towards increasing use of violence by Loyalist extremists were to continue.”³² In other words, the menace of jury tampering triggered introducing non-jury criminal trials in Northern Ireland.³³

In addition, the *Diplock Report* stated that jury tampering “cannot be overcome by any changes in the conduct of the trial, the rules of evidence or the onus of proof which we would regard as appropriate to trial by judicial process in a court of law.”³⁴ It is because of the “deep-rooted communal division in Northern Ireland that jury verdicts would be influenced unduly by sympathy for or hostility towards the accused on religious or political grounds.”³⁵ The *Diplock Report* suggested the problems in Northern Irish criminal justice would be solved by the introduction of non-jury trials for certain indictable ‘scheduled offences.’

After examining the significant violence, including the serious fear of jury tampering and a collapsed criminal justice system in Northern Ireland, the

³¹ See *Diplock Report* (n 19) 17

³² Ibid 18

³³ According to the *Baker report*, there was a case of jury intimidation by telephone before the night of the trial. In another trial of a loyalist, “the subtle but effective intimidation was the intermittent beating throughout the trial of a Lambeg drum at a distance from the court but so that the sound was clearly heard by the jury.” See *Baker Report* (n 27) 27

³⁴ *Diplock Report* (n 19) 3

³⁵ Walsh (n 18) 96-97

Diplock Commission concluded its examination, made suggestions for the new Northern Irish criminal justice system by publishing the so-called *Diplock report* in December 1972. The ideas eventually influenced widely to the Northern Ireland (Emergency Provisions) Act 1973 which was passed in July 1973. Section 31(2) of the Northern Ireland (Emergency Provisions) Act 1973 ceased the effects of the Civil Authorities (Special Powers) Act (Northern Ireland) 1922. By the act, non-jury criminal trials, the so-called ‘Diplock courts,’ were established on 8 August 1973. From 15 October 1973, the Diplock courts started to hear cases of defendants for scheduled offences by non-jury trials.

b.) The Composition of the Diplock courts

The Diplock courts were established by the Northern Ireland (Emergency Provisions) Act 1973³⁶ as non-jury criminal trials in Belfast.³⁷ The Act provided the composition of non-jury criminal trials with its ‘scheduled offence.’

Section 2(1) of the Northern Ireland (Emergency Provisions) Act 1973 stated that “A trial on indictment of a scheduled offence shall be conducted by the court without a jury.” Instead of a jury, a single judge decides both the facts and law for a criminal trial. The judge had the power as Section 2(2) of the Northern

³⁶ The Northern Ireland (Emergency Provisions) Act 1973 was only extended to Northern Ireland as Section 31(8) of the Act clearly provides.

³⁷ Firstly, Section 4(1) of the Northern Ireland (Emergency Provisions) Act 1973 also stated “A trial on indictment of a scheduled offence shall be held only at the Belfast City Commission or the Belfast Recorder's Court.” Section 6(1) of the 1978 repealed Section 4(1) of the Northern Ireland (Emergency Provisions) Act 1973 as “a trial on indictment of a scheduled offence shall be held only at the Belfast City Commission.”

Ireland (Emergency Provisions) Act 1973 stated that “The court trying a scheduled offence on indictment under this section shall have all the powers, authorities and jurisdiction which court would have had if they had been sitting with a jury, including power to determine any question and to make any finding which would, apart from this section, be required to be determined or made by a jury, and references in any enactment to a jury or the verdict or finding of a jury shall be construed accordingly in relation to a trial under this section.” In the Diplock courts, the trials are generally heard by the High Court judge. At the request of the Lord Chief Justice of Northern Ireland, a County Court judge would sit and act as the judge in the Diplock courts by Section 4(3) and (4) of the Northern Ireland (Emergency Provisions) Act 1973.³⁸

In a jury trial, the jurors do not give the reasons for their verdict. Conversely, the judges in the Diplock courts were required to give “a reasoned judgment in support of a decision to convict.”³⁹ By Section 2(6)(a) and (b) of the Northern Ireland (Emergency Provisions) Act 1973,⁴⁰ the defendant had an automatic

³⁸ A County Court judge tended to hear less serious offences. See Finn (n 1) 99

³⁹ Jackson and Doran (n 30) 11-12. Louis Blom-Cooper highly evaluated this point; he suggested that, “One reason for public recognition of the Diplock courts in the Northern Ireland Crown Court was that the trial judge was obliged to give a fully reasoned judgment for the verdict which meant it was possible for there to be a fully appellate review.” See Louis Blom-Cooper, ‘Judgment reserved on jury trials’ *the Guardian* (London, 20 February 2010)

⁴⁰ The Section stated that “A person convicted of any offence on a trial under this section without a jury may, notwithstanding anything in Section 8 of the Criminal Appeal (Northern Ireland) Act 1968, appeal to the Court of Criminal Appeal under that section” in two cases; firstly, “against his conviction, on any ground, without the leave of the Court of Criminal Appeal or a certificate of the judge of the court of trial,” and secondly “against sentence passed on conviction, without such leave, unless the sentence is one fixed by law.”

right to appeal to the Court of Criminal Appeal against his or her conviction, sentence or both.⁴¹

Schedule 4 of the Northern Ireland (Emergency Provisions) Act 1973 specified the ‘scheduled offences’ which were the offences which should be heard in the Diplock courts. The offences included murder, manslaughter, arson, riot, most non-fatal offences against the person, offences involving firearms, explosion, robbery, aggravated burglary, membership of proscribed organisations, and intimidation. Schedule 4 of the Northern Ireland (Emergency Provisions) Act 1978 added kidnapping, false imprisonment, conspiracy, and several actions in a prison to the scheduled offences. It was obvious that the scheduled offences covered “the major terrorist-type offences.”⁴²

Notes 1 and 2 of Schedule 4 of the Northern Ireland (Emergency Provisions) Act 1973 gave the Attorney General for Northern Ireland discretion to exclude any particular murder, manslaughter or grievous bodily harm cases from the scheduled offences. In other words, as Jackson and Doran have pointed out that, “This is made possible by the fact that a number of scheduled offences may be de-scheduled and tried by jury if the Attorney General exercises the de-scheduling power he has under the Northern Ireland (Emergency Provisions) Act when there is perceived to be no terrorist involvement.”⁴³ To render such discretion to the Attorney General has been subject to criticisms. For instance,

⁴¹ See Jackson and Doran (n 30) 11-12

⁴² John Jackson and Sean Doran, *Judicial Fact— Finding in the Diplock Court in Northern Ireland* (1990) Working Paper No.2, The University of Manchester 1

⁴³ Ibid 2

Lord Devlin criticised this by arguing that, “It is unsatisfactory that the exercise of a constitutional right should depend upon an executive decision.”⁴⁴ Jackson and Doran stated that “Certain offences such as armed robbery do not differ significantly from other kinds of offences such as ordinary robbery which are triable by jury.”⁴⁵ According to them, the Attorney General frequently permitted to certify offences which are not on the Schedule.⁴⁶

One of the noticeable differences from the previous criminal jury trials was that many trials “were carried on primarily on the basis of documentary evidence and depositions rather than the verbal evidence of witnesses.”⁴⁷ Boyle et al. suspected the reason for this is because of lack of the available evidence which was often limited to confessions or admissions.⁴⁸ Thus, the rules governing the admissibility of the confessions were changed.⁴⁹ Moreover, “The elimination of the jury did reduce the scope for the traditional skills of advocacy and cross-examination, and led to more direct discussion between counsel and judges on the basis of the written statements.”⁵⁰ Meanwhile, respect of documentary evidence had merits. For example, as Donohue has pointed out, “The written findings required a high level of discipline in the fact-finding phase of the trial: appellate courts tended to reverse Diplock convictions more

⁴⁴ Patrick Devlin, *Foreword* in Greer and White (n 3) ix

⁴⁵ Jackson and Doran (n 42) 2

⁴⁶ See Jackson and Doran (n 30) 21-22

⁴⁷ Boyle et al. (n 4) 98-99

⁴⁸ Ibid 99

⁴⁹ See Jackson and Doran (n 30) 11-12

⁵⁰ Boyle et al. (n 4) 99

frequently than jury convictions—most likely because the requirement that the judges write out their findings made it easier to challenge their conclusions.”⁵¹

The Diplock courts heard approximately one-third of all serious criminal cases in Northern Ireland.⁵² According to Jackson and Doran, over 10,000 defendants were heard in the Diplock courts from 1973 to 2002: the largest number of cases in the Diplock courts was 329 yearly in the mid-1980s.⁵³

c.) Efficacy of the Diplock courts

Boyle et al. stated that the introduction of the Diplock courts “succeeds in eliminating the more blatant forms of discrimination between Protestant and Roman Catholic defendants in the selection of charges, the granting of bail, the incidence of conviction and acquittal and the level of sentencing.”⁵⁴ According to Boyle et al., most Protestants thought they had got a fair criminal trial by a judge only.⁵⁵ In addition, Protestant defendants in the Diplock courts tended to plead their guilt and rely “on the judge’s leniency than from seeking an acquittal on the more serious charges.”⁵⁶ According to Carlton, the reason for rate of Protestants pleading guilty rose from 31 per cent to 70 per cent.⁵⁷ He analysed that, this was because the Protestant defendants could no longer rely on a

⁵¹ Donohue (n 30) 45

⁵² See Jackson and Doran (n 30) ix

⁵³ Ibid 19

⁵⁴ Boyle et al. (n 4) 117

⁵⁵ Ibid

⁵⁶ Ibid 97

⁵⁷ See Charles Carlton, ‘Judging without consensus’ (1981) 3(2) Law & Policy Quarterly 225, 235

“friendly jury.”⁵⁸ There were also criticisms from the Protestant side. For example, the inconsistency of the sentences has been pointed out, and others argued that, the Diplock courts had a prejudice against Protestants.⁵⁹ According to Boyle et al., there were many Roman Catholics thought the Diplock courts were prejudiced against Catholics, thus Roman Catholic defendants would not get a fair trial at courts.⁶⁰ Conversely, Donohue has pointed out that, more than the majority of Roman Catholics thought the Diplock courts were a better system than internment without trial which existed until 1973 in Northern Ireland.⁶¹ According to Carlton, from the establishing the Diplock courts, judges acquitted 5 per cent of Protestant defendants.⁶² On the other hand, they acquitted 12 per cent of Catholics.⁶³ Boyle et al. found that “The acquittal rate for Roman Catholics was in fact substantially the same as that in cases tried before the introduction of the Diplock courts, in which there had been a high level of directed acquittals.”⁶⁴

d.) Abolition of the Diplock courts

Regardless of the advantages and disadvantages of the Diplock courts, only a few people, including the members of the Diplock Commission, predicted the long life of the Diplock courts which lasted for more than 30 years.⁶⁵ After the

⁵⁸ Carlton (n 57)

⁵⁹ See Boyle et al. (n 4) 147-149

⁶⁰ Ibid 149

⁶¹ Ibid 144-150; Donohue (n 30) 45

⁶² See Carlton (n 57)

⁶³ Ibid

⁶⁴ Boyle et al. (n 4) 97

⁶⁵ See *Diplock Report* (n 19) 5. Jackson and Doran estimated that the restoration of trial by

Northern Ireland (Emergency Provisions) Act 1973, several Commissions, including the Gardiner Committee⁶⁶ and the Baker Commission, examined the efficacy of the Act and whether there was any necessity for amending the provisions. The Gardiner Committee analysed 482 witness and jury tampering instances between 1 January 1972 and 31 August 1974.⁶⁷ The Commission concluded it is reasonable to predict that jurors has been equally directed the risks of intimidation.⁶⁸ Although the Gardiner Committee stated that “We believe that trial by jury is the best form of trial for serious cases, and that it should be restored in Northern Ireland as soon as this becomes possible,”⁶⁹ it was impossible to do so unless Northern Irish situation was improved. According to the Baker Commission, there was a suggestion to bring juries from the mainland of the United Kingdom to Northern Ireland and let them try the criminal trials for scheduled offences.⁷⁰ The Commission rejected the idea as so unrealistic.⁷¹

jury for all indictable offences in Northern Ireland “is unlikely in the near future and even if the emergency method of trial were to be discontinued, this would probably be achieved by a gradual phasing out of the Diplock trials, rather than by an immediate return to jury trial of all cases.” See Jackson and Doran (n 30) preface, ix and 11-12

⁶⁶ The Gardiner Committee was appointed to “consider what provisions and powers, consistent to the maximum extent practicable in the circumstances with the preservation of civil liberties and human rights, are required to deal with terrorism and subversion in Northern Ireland, including provisions for the administration of justice, and to examine the working of the Northern Ireland (Emergency Provisions) Act 1973; and to make recommendations.” See *Gardiner report* (n 2) 1

⁶⁷ Ibid 10

⁶⁸ Ibid

⁶⁹ Ibid 10-12. Meanwhile, the Gardiner Committee recognised the efficacy of the Diplock courts and concluded “The right to a fair trial has been respected and maintained and that the administration of justice has not suffered.” Therefore, the Commission suggested that non-jury criminal trials need to be remained in the Diplock courts. The Baker Commission was lead to the similar conclusion. See *Baker Report* (n 27) 139

⁷⁰ Ibid 31

⁷¹ Ibid

Although the Diplock courts existed for a long time, there were continual criticisms of courts; some of them insisted on the abolition. As the first example, there were concerns that the number of ordinary offences which are not related to the Northern Irish political and social conflicts and which would generally be tried by a jury were categorised as ‘scheduled offences.’⁷² Therefore, Walsh stated that, the defendants lost their right to trial by jury unfairly.⁷³ The Baker Commission suggested that, “All scheduled offences which are triable summarily or which carry a maximum sentence of imprisonment for five years or less, should be capable of being certified out, ie as not to be treated as scheduled offences.”⁷⁴

As a second example, some people argued that an untrustworthy confession would damage the fairness of non-jury trials at the Diplock courts.⁷⁵ According to Greer and White, it was “the most common dispute”⁷⁶ in the Diplock courts. It could be assumed because the judges totally or virtually by confessions in approximately 86 per cent of cases at the Diplock courts.⁷⁷

In a criminal jury trial, the *voir dire* will operate for a judge to examine the legal admissibility of alleged confessions, if it is challenged by the defendant before the trial starts and jurors sit.⁷⁸ Once the judge is satisfied of its admissibility, the

⁷² See Greer and White (n 3) 15. According to Walsh, 40 per cent of the cases at the Diplock courts were counted as ordinary criminal offence cases. See Walsh (n 18) 99

⁷³ See Walsh (n 18) 99

⁷⁴ *Baker Report* (n 27) 40

⁷⁵ See Walsh (n 18) 98

⁷⁶ Greer and White (n 3) 16

⁷⁷ See Harvey (n 9) 24

⁷⁸ In the US, *voir dire* has used as a different meaning. See the later sections of this thesis.

jury will be summoned and asked to consider the confession at the trial. If not, the confession will not be mentioned to the jury in the trial, so that the jury will not know of the existence of the 'confession'. According to Walsh, the purpose of the *voir dire* is "to allow the jury to make up its own mind on how much weight, if any, to attribute to the confession; a question of fact."⁷⁹ In other words, the *voir dire* prevents the jury from having any unfair prejudice against the defendant.⁸⁰ If there is no jury, it will mean the judge always knows of the existence of a confession regardless of its admissibility. Therefore, is there a possibility that a judge has a prejudice against the defendant by a confession?

Louis Blom-Cooper suggested that, "The experience in Northern Ireland over three decades suggests that serious organised crimes can effectively and efficiently be tried before a professional court- a single judge or perhaps three judges."⁸¹ Moreover, as the tension between the British Government and the IRA eased, the average annual number of cases at the Diplock courts decreased from over 1,000 in the early years to over 400 from 1991 to 1993.⁸² After the Good Friday agreement between the British Government and the Republic of Irish Government in 1998, the number of cases in the Diplock courts decreased to 60 a year in the mid-2000s.⁸³

⁷⁹ Walsh (n 18) 98

⁸⁰ Ibid

⁸¹ Louis Blom-Cooper, 'Judge only trials should be an option for serious organised crimes' *the Guardian* (London, 21 May 2010)

⁸² See Jackson and Doran (n 30) 19

⁸³ See Northern Ireland Office, 'Replacement Arrangements for the Diplock Court System' (2006) Consultation paper
<<http://cain.ulst.ac.uk/issues/politics/docs/nio/nio110806diplock.pdf>>
accessed 8 March 2015

Eventually, the Diplock courts were abolished in July 2007 by the Justice and Security (Northern Ireland) Act 2007. Nevertheless, as in other areas of the United Kingdom, non-jury criminal trials have still existed in Northern Ireland. Recently, non-jury trials in Northern Ireland deal not only with the problem of Republican versus Loyalist paramilitaries, but also with Al-Qaeda terrorists. In the first example of such a case, an Al-Qaeda sympathiser who had information on bombing an airliner was arrested and found guilty, with a sentence of six years at the non-jury trial in Northern Ireland on 20 December 2005. In *R v Mackle* in 2007, a juror in a trial in Northern Ireland reported he was approached by two partly masked men who attempted to bribe the juror if he gave them any information about the case.⁸⁴ Therefore, the judge discharged the jury and start a new trial without a jury.⁸⁵ In January 2012, the trial of Brian Shivers and Colin Duffy, suspected as being the Real IRA murderers of two British soldiers at Massereene army base in Northern Ireland, was heard without a jury.⁸⁶

According to Northern Ireland Statistics and Research Agency's statistics in 2007, public confidence of Northern Ireland jury was 74 per cent which was increased from 64 per cent, the rate in 1992/1993, although the people who argued the jury is less confident is as in 1992/1993 and 2007: 18 per cent.⁸⁷

There have been seen no big differences in public confidence rates of Northern

⁸⁴ *R v Mackle* [2007] NICA 37

⁸⁵ Ibid

⁸⁶ See Henry McDonald, 'Brian Shivers found guilty of Massereene murders' *the Guardian* (London, 20 January 2012)

⁸⁷ See Julian Roberts and Mike Hough, *Public opinion and the jury: an international literature review* (1st edition, Ministry of Justice Research Series 1/09, 2009) 17

Irish jury between Protestants and Catholics.⁸⁸ However, significantly, Amelin, Willis and Donnelly's research in 2000 indicated that public confidence of the fairness of juries, 75 per cent, was slightly less than the one of judges and magistrates, 77 per cent.⁸⁹ This would show Northern Irish perception on the jury and a non-jury trial has not been so different recently.

e.) Lessons from the Diplock courts

Since the Diplock courts are not directly in relation to the problem of jury tampering in modern English society, the analysis of the Diplock courts in this thesis will not be so detailed. Nevertheless, the experiences of non-jury trials in Northern Ireland supply us with meaningful lessons to consider when we examine jury tampering problem and English non-jury trials after the enforcement of the Criminal Justice Act 2003. As a conclusion of this section, it notes the possible lessons from the Diplock courts.

Firstly, as in the contemporary situation in England, finding evidence of jury tampering was difficult. As Walsh suggested, "No firm evidence was ever produced to show it was a very real factor"⁹⁰ in jury tampering. It is easy to concur with the Baker Commission's statement that "Scheduled offences should be tried by judge alone was based on the fear that jurors might be intimidated,

⁸⁸ 79 per cent of Protestants and 80 per cent of Catholics showed their public confidence in the Northern Irish jury system in 2003. See Roberts and Hough (n 87)

⁸⁹ See Kristine Amelin, Michael Willis and Debbie Donnelly, *Attitudes to Crime, the Criminal Justice System in Northern Ireland. Review of the Criminal Justice System in Northern Ireland*, Research Report Number 2 (1st edition, HMSO, 2000); Roberts and Hough (n 87) 18

⁹⁰ Walsh (n 18) 127

coupled with some perverse acquittals of loyalists, rather than on actual evidence of intimidation.”⁹¹

Secondly, jury protection in cases of jury tampering by police was not always efficient enough. In Northern Ireland, terrorism itself inherently “means wide spread intimidation in all sections of the community.”⁹² Not only, jurors, but jurors’ families and relatives were approached. Therefore, the scope of the efficient protection of jurors could not always be decided, and it would have been not enough to prevent any influence from tampering if police has protected jurors only.

Thirdly, although there was no jury in the trial, the Diplock courts did not alter the traditional adversarial criminal justice system. Criticisms against non-jury criminal trials argued it was a serious change from the adversarial to the inquisitional criminal justice system. As Jackson and Doran stated that “The transition to trial by judge alone did not require any major upheaval of the adversarial trial structure.”⁹³ Judges did not correct evidence by themselves; this was the role of other parties in the criminal trial.⁹⁴ Moreover, judges needed to give the reason for their judgments in trials, and it enforced their rights to find the facts in the Diplock courts deliberately. Therefore, the criticism that “The absence of the jury may well create a situation in which a greater degree of

⁹¹ *Baker Report* (n 27) 27

⁹² *Gardiner report* (n 2) 42

⁹³ Jackson and Doran (n 30) 11

⁹⁴ See Jackson and Doran (n 42) 20

intervention by the trial judge is accommodated”⁹⁵ would not always be applicable.

⁹⁵ Jackson and Doran (n 42) 20

3. The practical weaknesses of jury trials— dealing with cases of serious and complex fraud

As found in the previous chapters, the Criminal Justice Act 2003 attempted to propose a non-jury trial in cases of serious and complex fraud as well as jury tampering. This differs from Section 44 of the Act, which provided for non-jury trials in the case of jury tampering and was enforced in 2007. Section 43 of the Act, dealing with fraud trials, has not yet been enforced. This chapter will explain serious and complex fraud cases and the background of a non-jury trial on such a case.

1.) The notion of fraud

As Blake has pointed out, crime has become more complicated recently: in particular, fraud cases.¹ Fraud is highly ambiguous criminal offence. Criminal offences of fraud “include obtaining property by deception, false accounting, fraudulent trading, theft and the common law offence of conspiracy of defraud.”² The Fraud Act 2006 more specifically categorises criminal offences of fraud.

¹ See Nicholas Blake, ‘The Case for the Jury’ in Mark Findlay and Peter Duff (ed), *The Jury Under Attack* (1st edition, Butterworths, 1988) 152

² Lord Roskill, *Fraud Trials Committee Report* (1st edition, Her Majesty’s Stationery Office, 1986) 39

Fraud trials tend to be more complex and much longer because they are rarely easy for jurors to understand fully.³ Especially, in serious and complex cases, fraud trials require to support the jurors' understanding the issues with a great effort.⁴ What sort of offence could be distinguished as a serious and complex fraud case? According to *Attorney General's guidelines on pleas discussions in cases of serious or complex fraud*, if at least two aspects of below are present, the case may be defined as serious or complex fraud⁵:

the amount obtained or intended to be obtained is alleged to exceed £500,000;

there is a significant international dimension;

the case requires specialised knowledge of financial, commercial, fiscal or regulatory matters such as the operation of markets, banking systems, trusts or tax regimes;

the case involves allegations of fraudulent activity against numerous victims;

the case involves an allegation of substantial and significant fraud on a public body; the case is likely to be of widespread public concern;

the alleged misconduct endangered the economic well-being of the United Kingdom, for example by undermining confidence in financial markets.

The decision as to whether the case constitutes serious or complex fraud is taken by the prosecutor.⁶

³ See Royal Commission of Criminal Justice, *Royal Commission Report on the Criminal Justice System* (Cmd 2263, 1993) 136. The so-called *Runciman Report*.

⁴ Ibid

⁵ Her Majesty's Attorney General, *Attorney General's guidelines on pleas discussions in cases of serious or complex fraud* (1st edition, Attorney General's Office, 2009) 1

⁶ Ibid

2.) The problematic elements of a serious and complex fraud trial by jury

a.) Cost in both money and time

Serious and complex fraud trials tend to take a long time to be decided.

According to Kirk, it is just a recent phenomenon: most fraud case lasted within two weeks before the 1970s.⁷ As reasons for the longer fraud trials seen more recently, Kirk raised the failure of the prosecution and court management to the complexity of modern life.⁸ Nowadays, a criminal jury trial on serious and complex fraud may take over one hundred days,⁹ much longer than a general jury trial. The jury in a serious and complex fraud case may be required to read a large amount of documentary evidence.¹⁰ In a trial, the parties and the judge may need to explain complex fraud matters to the jury many and long times to ensure their understanding of facts.¹¹ Long jury service can prove inconvenient to the jurors. According to the White Paper *Justice for All*, the time commitment of a fraud trial had a negative effect on jurors' personal and working lives.¹² The Roskill Committee raised the question, whether it is "fair, and ultimately in the interests of justice, to impose such burdens upon the ordinary citizen?"¹³ Moreover, the Roskill Committee put forward strong evidence to indicate that it

⁷ See David Kirk, 'Fraud trials: a brave new world' (2005) 69 *Journal of Criminal Law* 508, 512

⁸ Ibid

⁹ See Penny Darbyshire, *Darbyshire on the English Legal System* (10th edition, Sweet & Maxwell, 2011) 561

¹⁰ See Roskill (n 2) 140

¹¹ Ibid 141

¹² See Home Office, *Justice for All* (Cmd 5563, 2002) 74

¹³ Roskill (n 2) 141

is almost impossible for the average juror to memorise all the facts and figures in a long fraud trial.¹⁴

To detain the jury for a long case entails vast expense. Thus, the cost is also one of the serious negative aspects of fraud jury trials. However, Ireland suggested that if the judge can manage the time of the trial more efficiently, even though the trial is conducted by jury, the problems of being overly time consuming will be resolved.¹⁵

One of the English longest and expensive fraud trials was *R v Rayment and Others*,¹⁶ the so-called ‘Jubilee Line trial.’ It had lasted 21 months by the time of verdict.¹⁷ The trial totally cost over £25m according to Wooler.¹⁸

Lloyd-Bostock suggested “The Jubilee Line trial clearly placed an unacceptable burden on the jurors.”¹⁹ Indeed, almost two years jury service must influence each juror’s life and business negatively. Wooler argued that, such a long period of trial will exceed the extent for a citizen to be able to bear simply as part of civic duty, unless the court will take any measures to avoid the burden.²⁰ The

¹⁴ Roskill (n 2) 141-42

¹⁵ See Sally Ireland, ‘Fraud (Trials Without a Jury) Bill Briefing for House of Commons Second Reading’ (2006) JUSTICE 7-8

¹⁶ *R v Rayment and Others* [24 March 2005] Central Criminal Court
<<http://www.theyworkforyou.com/wms/?id=2005-03-22b.17.2>> accessed 8 March 2015 (Unreported)

¹⁷ See Sally Lloyd-Bostock, ‘The Jubilee Line Jurors: does their experience strengthen the argument for judge-only trial in long and complex fraud cases?’ (2007) Criminal Law Review 255, 255

¹⁸ See Stephen Wooler, *Review of the Investigation and Criminal Proceedings Relating to the Jubilee Line Case* (1st edition, HM Crown Prosecution Service Inspectorate, 2006) v

¹⁹ Lloyd-Bostock (n 17) 270. Wooler also states that “The trial was a quite intolerable burden” for a juror. See Ibid x

²⁰ Wooler specifically raises the solution: “more structured support for jurors, to enable them to plan more effectively and minimise disruption to their personal and family lives;

Court of Appeal affirmed that, no jury seemed to remember the evidence fully when the jury deliberation was started because of the extraordinary length of the hearing.²¹ On the other hand, according to Grieve, the reason for the delay of the trial of *R v Rayment and Others* was not because of the jury incapability, but the unusual combination of the factors which proved unavoidable.²²

Lloyd-Bostock stated that “It confirms that jury trial is valued, and that improvements through trial preparation, and trial and jury management, should be fully explored before the jury itself is threatened.”²³

b.) Complications

Black maintained, “Jurors have little familiarity with the type of situation confronting them in fraud trials and so their inferences are not supported by a consolidated body of knowledge.”²⁴ However, most citizens have little experience of serious crime, so the question is raised— why should a fraud trial be especially problematic for jurors? Fraud trials tend to be complex compared

and to provide authoritative assistance in resolving difficulties directly attributable to the length of jury service.” Wooler recommends that this ‘authoritative assistance’ may include detailed and clear explanation for a jury on the fraud case. Wooler (n 18) x and xiii

²¹ Ibid 86. Young has pointed out that, the jury capability of comprehension and recalling are the two significant problems in a serious and complex fraud trial. See William Young, ‘Summing up to juries in criminal cases – What jury research says about current rules and practice’ (2003) Criminal Law Review 665, 684.

²² The factors include the illness of one of the defendants and the way it was presented by the prosecution. See Dominic Grieve, ‘Speech on the jury system and the challenges it faces, given as part of Politeia’s justice series’ (2013) <<https://www.gov.uk/government/speeches/in-defence-of-the-jury-trial>> accessed 8 March 2015, 4

²³ Lloyd-Bostock (n 17) 270

²⁴ Alison Black, ‘The Effect of Glossaries on Jurors’ Comprehension in Fraud Trials’ in Fraud Trials Committee, *Improving the Presentation of Information to Juries in Fraud Trials* (1st edition, A Report of Four Research Studies, Her Majesty’s Stationery Office, 1986) 14

to other type of criminal cases. In serious and complex fraud cases, both the number of defendants and the charges against each of them may be multiple.²⁵ The juror may not remember or distinguish between the offences of each defendant. The Roskill Committee concluded that “The background against which the frauds are alleged to have been committed— the sophisticated world of high finance and international trading— is probably a mystery to most or all of the jurors, its customs and practices a closed book. Even the language in which the allegedly fraudulent transactions have been conducted will be unfamiliar.”²⁶

As Home Office’s consultation paper stated that “A key consideration is whether it is necessary to have a detailed understanding of inherently complicated financial procedures in order to assess if a person has acted dishonestly.”²⁷ Bekerian et al. found that jurors who deeply and correctly understand evidences and information at the complex fraud trial tend to more likely convict the defendant.²⁸ Therefore, lower levels of comprehension may be more likely to lead to an acquittal verdict.²⁹ As the Roskill Committee explained, “Fraudsters are often highly intelligent individuals. They exercise great skill in conducting their operations, and may use companies or bank

²⁵ See Roskill (n 2) 140

²⁶ Ibid

²⁷ Home Office, *Juries in serious fraud trials: A consultation paper* (1st edition, Home Office Communication Directorate, 1998) 7

²⁸ See Debra Bekerian et al., ‘Improving Jurors’ Understanding and Memory for Evidence by Pre and Post Evidence Summaries’ in Fraud Trials Committee, *Improving the Presentation of Information to Juries in Fraud Trials* (1st edition, Her Majesty’s Stationery Office, 1986) 58

²⁹ Ibid

accounts overseas through which funds are channeled.”³⁰ Therefore, the defendant of a serious and complex case may eventually be able to cheat even jurors who may not understand the facts appropriately and acquit the defendant in the trial.³¹ Of course, there may also be a risk of wrong conviction as well.

From above, it could be said that whether a juror properly understands facts and evidence in a serious and complex fraud case is a significant aspect in achieving a fair trial.³² If “an *overall impression* of guilt or innocence in the minds of jurors”³³ without deep understanding of the facts of the case, decided the verdict, this would constitute an unfair trial. The Roskill Committee concluded that, “Many of our witnesses have asserted that many jurors are almost certainly out of their depth in complex fraud cases.”³⁴ Williams stated that the least suitability of jurors for the serious and complex fraud cases.³⁵ He found that even the simplest evidences of proper accountancy or business practice would not be understood appropriately by a jury.³⁶

There is an interesting empirical research by Logie et al., which examined the mock jurors’ memory on a serious and complex fraud cases, and asked them to listen to an extract from the judge’s summing up in a real fraud case. The extract

³⁰ Roskill (n 2) 140

³¹ Ibid

³² See Fraud Trials Committee, *Improving the Presentation of Information to Juries in Fraud Trials* (1st edition, Her Majesty’s Stationery Office, 1986) iii

³³ Roskill (n 2) 141

³⁴ Ibid

³⁵ See Glanville Williams, *The Proof of Guilt* (3rd edition, Stevens & Sons Limited, 1963) 279

³⁶ Ibid

lasted around one and half hours, and summarised the trial.³⁷ Logie et al. found that few mock jurors adequately understood the charges or the circumstances on the case.³⁸ Thus, there has been a concern that opinions of such a minority of jurors, who understand the evidence precisely, may be overly dominant and influential.³⁹ It could also be said that if the ‘wrong voice’ among less understanding mock jurors were louder because of the larger number, it will have also risks to constitute a miscarriage of justice. On the other hand, Ireland has stated that “There is no evidence that juries are not understanding fraud cases; indeed, fraud offences are defined by reference to the standards of ordinary people.”⁴⁰

The judge, prosecutors and police also must be competent in order to understand serious and complex fraud cases. The *Runciman Report* has pointed out that, in a complicated long fraud case, all parties should be “well trained, carefully selected, and provided with effective administrative support.”⁴¹ Therefore, appropriately allocating capable judges who “must recognise that specialist knowledge and experience”⁴² would also be significant in some cases.

³⁷ See Robert Logie, John Duncan and Alan Baddeley, ‘Difficulties with comprehension, memory and concentration in listening to complex information’ in Fraud Trials Committee, *Improving the Presentation of Information to Juries in Fraud Trials* (1st edition, Her Majesty’s Stationery Office, 1986) 45

³⁸ Ibid

³⁹ See Roskill (n 2) 141. Kirk concurred with this concern. See Kirk (n 7)

⁴⁰ Ireland introduced a media interview for one of the jurors of *R v Ghosh* [1982] QB 1053, CA. In the interview, the juror stated that she easily understood the evidence. See Ireland (n15) 2 and 6

⁴¹ *Runciman Report* (n 3) The judge, prosecutors and police also must carefully deal with any forensic evidence. It should be expected that any failures in a jury trial may sometimes stem not from the nature of the mode of trial but from the judge, prosecution or police failure including the use of forensic evidence.

⁴² Ibid

3.) Discussion of the *Auld Report* and Section 43 of the Criminal Justice Act 2003

a.) The Roskill Committee and the Fraud Trials Tribunal

The difficulties above have led to some legal associations to demand trial by juries to be abolished on fraud and propose other system like a non-jury criminal trial. In April 1984, the Fraud Trials Committee, which was chaired by Lord Roskill (the so-called ‘Roskill Committee’) was established “in response to growing public concern at the effectiveness of present methods of combatting serious commercial fraud.”⁴³ The Committee discussed existing law and trial by jury on fraud and sought other forms of trial instead of the existing trial by jury on fraud. As Thompson noted, the Roskill Committee was “eminently qualified to consider complex fraud. The members knew much about offences against the rights of money.”⁴⁴ In their report, the Roskill Committee suggested that new fraud trials should be conducted by one judge and two lay members selected based on the following criteria:⁴⁵

Persons should be handpicked after a careful process of enquiry and vetting.
They should not have any known extreme views in any direction, which might affect their ability to form a balanced view.
Their integrity should not be open to doubt.

⁴³ Fraud Trials Committee (n 32)

⁴⁴ E.P. Thompson, ‘Subduing the Jury’ (1986) 8(21) London Review of Books 7, 8

⁴⁵ Roskill (n 2) 149

They must have experience of business dealings and the capacity to enable them to understand the kind of complex issues which will arise in this class of case.

They should be able to devote adequate time to the job.

They should be of different age groups and should not be restricted to those in retirement.

The Committee named this new type of trial as the ‘Fraud Trials Tribunal’. At the Fraud Trials Tribunal, only the judge deals with the questions of law, exercises judicial discretion and is responsible for sentencing a defendant.⁴⁶

The Roskill Committee stated that “We are satisfied that the Fraud Trials Tribunal would considerably reduce the length and cost of trials which at the same time increasing the prospects of a sound verdict being reached. The savings of judges and the court time and the greatly improved comprehension of the matters under enquiry would allow more, if not all, complex fraud cases to be brought to trial and provide a further deterrent to those who seek to engage in fraudulent operations.”⁴⁷

Thompson argued that “We are to be governed by experts for our own good.”⁴⁸ Moreover, the Roskill Committee used not a real jury but a mock jury to examine the limited comprehension of jurors because of the regulation by Section 8 of the Contempt of Court Act 1981.⁴⁹ This led to the criticism of

⁴⁶ See Roskill (n 2) 150-51

⁴⁷ Ibid 147

⁴⁸ Thompson (n 44) 13.

⁴⁹ See Lord Roskill (n 2) 142

the persuasiveness and quality of the Roskill Committee's research.⁵⁰ The suggestion that introduced the idea of Fraud Trials Tribunal was not implemented in the Criminal Justice Act 1987.⁵¹

b.) The Auld Report

Following the defeat of the Roskill Committee's proposal for 'Fraud Trial Tribunals,' the movement to abolish fraud trials by jury has still continued. The Runciman Commission stated that "Juries should no longer be used for trials of complex and serious fraud."⁵² There were some specific proposals, including the introduction of a new straightforward offence of fraud, which would make cases easier to present to juries, or a system of smaller fraud juries composed of six or seven jurors who required to reach a certain educational standard.⁵³

In 1999, Lord Justice Auld and his Committee conceived another "fact-finding tribunal"⁵⁴ which would replace the existing fraud trial by jury. His attempt was considered more radical than those of previous Commissions. His proposal included creating two types of new fraud tribunals.⁵⁵

⁵⁰ For example, see Terry Honess, 'Juror competence in processing complex information: implications from a simulation of the Maxwell trial' (1998) *Criminal Law Review* 763, 765

⁵¹ See Peter Thornton, 'Trial by jury: 50 years of change' (2004) *Criminal Law Review* 683, 696-697

⁵² *Runciman Report* (n 3)

⁵³ See Robert Rice, 'Jury Role in Fraud Trials to Be Probed' *the Financial Times* (London, 21 September 1996)

⁵⁴ David Corker, 'Trying fraud cases without juries' (2002) *Criminal Law Review* 283, 283. See also Robin Auld, *A Review of the Criminal Courts of England and Wales* (2001) Ministry of Justice, Chapter 5 (The so-called *Auld Report*)

⁵⁵ One is the trial by judge alone which treats highly complicated fraud cases. Another is the trial by judge and magistrates which named 'District Division' which treats the other

Based on the *Auld Report*, the White Paper *Justice for All* was published.⁵⁶ This White Paper concurred with the proposal for the new tribunal by judge alone without jury for complicated fraud cases.⁵⁷ Referring to the *Auld Report* and this White Paper, Section 43 of the Criminal Justice Act 2003 was enacted.

c.) Section 43 of the Criminal Justice Act 2003

Section 43 of the Criminal Justice Act 2003 proposed the fraud trial by judge alone in certain cases when requested by the prosecution at a preparatory hearing. Specifically, Section 43(5) stated that “If the complexity of the trial or the length of the trial (or both) is likely to make the trial so burdensome to the members of a jury hearing the trial that the interests of justice require that serious consideration,”⁵⁸ the trial may be conducted without a jury.

4.) Subsequent developments: the reasons for the denial of Section 43 of the Criminal Justice Act 2003 by Parliament

Lord Falconer claimed the Government was not arguing that juries lack the capability to understand serious fraud cases.⁵⁹ He continued “Fraud trials can

fraud trials. In detail, see also Auld (n 54) 143, 177 and 232, etc. In addition, see Thornton (n 51) 697

⁵⁶ See *Justice for All* (n 12)

⁵⁷ However, the White Paper does not concur with the establishment of ‘District Division’ because the paper considered that it will be difficult to recruit the expertises who have the financial knowledge and it seems to take time consuming. Ibid 75

⁵⁸ See Section 43(5) of the Criminal Justice Act 2003

⁵⁹ See *The Times*, (London, 3 December 2002)

last more than a year and it is too onerous to ask jurors to take months or years out of their lives on such cases.”⁶⁰ However, Section 43 of the Criminal Justice Act 2003 caused further discussion because it would eventually abolish a criminal jury trial in specific fraud cases.

Kirk predicted non-jury criminal trial in case of serious and complex fraud cases will work very well and achieve shorten and cheaper trial, although the conviction rate on those case will increased.⁶¹ In addition, he estimated prosecutors and judges will agree with dozens of applications for non-jury trial.⁶² Lord Goldsmith, then Attorney General, actively suggested passing the Fraud (Trials Without a Jury) Bill 2006-2007 which would abolish trial by jury in prime criminal fraud cases and replace section 43 of the Criminal Justice Act 2003. However, the bill was subject to criticism. This was because the standard which distinguished serious or less serious frauds was perceived as awkward, without any realistic method of deciding law to put serious frauds into different category.⁶³ Therefore, the bill was defeated in the House of Lords in March 2007. Even now, introducing a non-jury criminal trial in case of serious and complex fraud case has not been realised.⁶⁴

⁶⁰ *The Times* (n 59)

⁶¹ See Kirk (n 7) 517

⁶² *Ibid*

⁶³ See JUSTICE, the Law Society and the General Council of the Bar, *Preserve The Right To Jury Trials* (2005) 1

⁶⁴ Section 113 of the Protection of Freedoms Act 2012 repealed Section 43 of the Criminal Justice Act 2003.

5.) Improving the jury's understanding of serious and complex fraud cases

Lord Devlin suggested that, non-jury criminal trials in the case of serious and complex fraud cases, “mean that those accused of fraud were placed at a disadvantage as compared with the ordinary accused.”⁶⁵ To address the problems of serious and complex fraud trial by jury without proposing non-jury criminal trials, he argued the court must take several means to improve a jury's understanding of the complicated fraud case.

Black's research found that passing jurors a glossary explaining the technical, legal and financial terms of the serious and complex fraud case in plain language, before the trial starts, could be an efficient way to improve jurors' understanding.⁶⁶ According to Black, the glossary would be inexpensive.⁶⁷ The idea has been shared with Runciman Commission which concluded that, “In complex cases, and in all cases where there has been a preparatory hearing, we recommend that the judge should consider whether one or more written documents might with advantage be given to jury.”⁶⁸ Moreover, the Runciman Commission suggested that, written guidance on legal points at the summing up by a judge, before the jury deliberation in a serious and complex case, is preferable.⁶⁹

⁶⁵ Patrick Devlin, 'Trial by jury for fraud' (1986) 6(3) Oxford Journal of Legal Studies 311, 314

⁶⁶ See Black (n 24) 7

⁶⁷ Ibid 15

⁶⁸ *Runciman Report* (n 3) 134

⁶⁹ Ibid 135

Wright et al. stated that the use of well-designed graphs and simpler language in the presentation for a jury by parties at a serious and complex fraud would improve jurors' understanding of facts: for example, "a graph which has informative captions, clearly labelled axes, grid lines, and make appropriate use of colour."⁷⁰ The Runciman Commission suggested a similar idea:

"Technological aids, such as charts or tables that can be shown in colour on visual display units, should always be provided where this would assist in the presentation of complicated facts to the jury."⁷¹

Finally, there has been an idea of 'special jury' for complex fraud trials. A special jury for fraud trials was introduced by Juries Act 1825. It was composed of the people who have the status of banker, merchant or esquire.⁷² In 1870, the new condition was added to the rule, and a juror "had to occupy property with a higher rateable value than was laid down for qualification as a common juror."⁷³ There was such a tribunal both on English civil and criminal cases, but it was abolished in the Juries Act 1949 except the one for some commercial cases.⁷⁴ The reason for the abolition was because of the unclear criteria which separated a special jury and common jury. Moreover, providing 'special' statuses to jurors based on the value of their properties was unacceptable in contemporary English

⁷⁰ Patricia Wright, Ann Lickorish and Audrey Hull, 'Presenting Numerical Information to Fraud Trial Juries' in Fraud Trials Committee, *Improving the Presentation of Information to Juries in Fraud Trials* (1st edition, Her Majesty's Stationery Office, 1986) 30

⁷¹ *Runciman Report* (n 3) 135

⁷² See Section 31 of the Juries Act 1825.

⁷³ Home office (n 27) 22

⁷⁴ Eventually, the special jury for some commercial cases was abolished in the Courts Act 1971. Ibid

society.⁷⁵ However, as the consultation paper stated that “Those whose profession and qualifications testify to their having certain skills and abilities might, if workable, be more acceptable.”⁷⁶ If a trial was composed of common jurors only, but with an expert witnesses on complex fraud, it will be possible. Even if some experts engaged in a serious and complex fraud trial together with a jury, it is not necessary that the jury will be influenced by the advice given. Nietzel et al. stated that “Jurors appear to give a balanced consideration to expert testimony. Their decisions are not dictated by experts, neither are they immune to expert’s opinions, especially when these opinions are expressed in case-specific language or include clear conclusionary statements.”⁷⁷ Therefore, the idea of introducing a jury trial with some fraud experts in case of a serious and complex fraud case should not be excluded.

A non-jury criminal trial in a serious and complex case has not been introduced in England. To abolish a traditional jury trial in any certain case could be treated as a revolutionary concept in the English society. Therefore, it is understandable that the non-jury criminal trial based on Section 43 of the Criminal Justice Act 2003 has not been enforced so smoothly and easily. In addition, compared with jury tampering cases and serious and complex fraud cases, there appeared to be more serious and pressing matters, such as to debate and resolve in relation to fairness of a jury trial in England recently.

⁷⁵ See Home office (n 27) 22

⁷⁶ Ibid

⁷⁷ Michael Nietzel, Denis McCarthy and Monica Kern, ‘Juries’ in Ronald Roesch, Stephen Hart and James Ogloff (ed), *Psychology and Law* (Paperback edition, Kluwer Academic/Plenum Publishers, 1999) 44

4. The practical weaknesses of jury trials—contempt of court committed by jurors

The previous chapter suggested that there are certain types of complex cases that are difficult for a juror to understand. According to the *Crown Court Study*, 91 per cent of jurors said it was not difficult for them to understand the evidence in a trial.¹ Despite this exceptionally high rate, no one has yet examined whether the jurors actually understood the evidence in the trial.

Gleisser suggested that, “It is apparent that a juror often is influenced not only by the facts in a case but also in the relationship of those facts to the juror’s personal attitudes toward certain crimes.”² If a juror decides a case by using any information or own knowledge outside of the court evidence, will it be a perverse verdict? Fenwick and Phillipson indicate that, “Residual possibility of a miscarriage of justice was ... the necessary price to be paid for the preservation and protection of the jury system.”³ However, is such a risk of miscarriage of justice really legitimated as the necessary price? This chapter will examine the perverse verdicts and miscarriages of justice that constitute contempt of court committed by jurors in the age of the Internet and assess the quality of a contemporary English jury as an appropriate decision-making body.

¹ See the Royal Commission on Criminal Justice, *Crown Court Study* (1993) HMSO Research Study No.19, 206

² Marcus Gleisser, *Juries and Justice*, (1st edition, Barnes, 1968) 174

³ Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (1st edition, Oxford University Press, 2006) 231

1.) Section 8 of the Contempt of Court Act 1981

According to Black's law dictionary, contempt is defined as a "conduct that defies the authority or dignity of a court or legislature."⁴ To assure fairness in a trial, the court may need to monitor carefully whether the jury verdicts were perverse or not. As Johnston et al. state that "Broadly speaking, the courts in common law countries will allow an appeal from a jury verdict when extraneous information has been accessed by a juror or jurors and it would be unsafe to allow the verdict to stand."⁵ How can the court ascertain each juror's attitude and state of mind in the decision-making process? For example, prior to a trial, to eliminate the prejudiced jurors, the judge sometimes uses questionnaires for selection.⁶ The Court of Appeal has argued these needs to be exceptional.⁷

Moreover, Johnston et al. indicate "In the United Kingdom, a court can direct its registrar to ask the Criminal Cases Review Commission to conduct an investigation of a jury and its deliberations to inform itself on appeal, should that be required."⁸ The Commission has the power to send criminal cases back

⁴ Bryan Garner (ed), *Black's law dictionary* (9th edition, 2009) 360

⁵ Jane Johnston, Patrick Keyzer, Geoffrey Holland, Mark Pearson, Sharon Rodrick, and Ann Wallace, *Juries and Social Media: a report prepared for the Victorian Department of Justice* (1st edition, The Standing Council on Law and Justice, 2013) 12

⁶ For instance, see *R v Maxwell* [1995] Transcript of pre-trial ruling (27 April 1995)

⁷ See *R v Tracey Andrews* [1995] Crim LR 156 and commentary at 157

⁸ Johnston et al. (n 5) 13. The Criminal Appeal Act 1995 established this independent public body "to review the miscarriages of justice in the criminal courts of England, Wales and Northern Ireland and refer appropriate cases to the appeal courts." The Commission was set up after some high profile miscarriages of justice were exposed. Cases would be reinvestigated, "if it found that there is a 'real possibility' that an appeal court would quash the conviction or, in the case of an appeal against sentence, change the sentence in question." See the website of the Criminal Cases Review Commission, 'About the Criminal Cases Review Commission' (2015)

<<https://www.justice.gov.uk/about/criminal-cases-review-commission>> accessed 8 March

to an appeal court to hear the case again. Needless to say, an appellant has only one opportunity to appeal his or her offence. The Commission has the power to refer a case back to the appeal courts for a fresh appeal. In other words, the Commission gives appellants the final chance to testify the existence of a miscarriage of justice in his or her case and ask for a repeal of misjudge by the Court of Appeal or a jury. Nevertheless, it is difficult for the court to monitor thoroughly whether a juror researched or revealed information on the case by using the Internet or any social media.

Section 8 of the Contempt of Court Act 1981 had severely restricted revealing of information on the jury deliberation to the outside including media and academics.⁹ It had also regulated the jurors' private research on the cases and their based on Section 8 of the Contempt of Court Act 1981.

The direct trigger of the enactment of Section 8 was *Attorney General v New Statesman & Nation Publishing Co Ltd* (1981.)¹⁰ One of the jurors in the trial that acquitted the previous Liberal Democratic Party leader Jeremy Thorpe of conspiracy to murder, revealed information on the proceedings to *the New Statesman* magazine in 1979. This trial was high in the spotlight at that time. The magazine conducted an interview with the juror, asking "how the jury had

2015. Based on Sections 17 to 22 of the Criminal Appeal Act 1995, the Commission has the power to obtain information from public bodies such as police, the Crown Prosecution Service, social services, local councils and the NHS.

⁹ The Section 8 of the Contempt of Court Act 1981 was repealed by Section 74(2) of the Criminal Justice and Courts Act 2015, however, the severe restrictions towards the disclosure of jury deliberation remains prominent. See below

¹⁰ *Attorney General v New Statesman & Nation Publishing Co Ltd* [1980] 1 All ER 644, [1981] QB 1

reached its decision.”¹¹ In the case, the judgment held that the publishing of the article in the magazine was not regarded as contempt of court because it did not “imperil the finality of jury verdicts or to affect adversely the attitude of future jurors or the quality of their deliberations of the trial.”¹² After the judgment, the Government immediately moved to enact the new clause; Section 8 of the Contempt of Court Act 1981.¹³

Section 8(1) of the Contempt of Court Act 1981 stated that “It is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.”¹⁴ A breach of the Section 8 causes a punishment by a fine or imprisonment for up to two years.¹⁵

Cram suggests two main reasons for this severe regulation. Firstly, if it introduced prejudicial information into jury deliberations, the rules of evidence will be undermined.¹⁶ Moreover, if such a prejudicial information was used at

¹¹ Sally Lloyd-Bostock and Cheryl Thomas, ‘The Continuing Decline of the English Jury’ in Neil Vidmar (ed), *World Jury systems* (Reprinted edition, Oxford University Press, 2003) 58

¹² Michael Zander, *Cases and Materials on the English Legal System* (10th edition, Cambridge University Press, 2007) 536

¹³ See Lloyd-Bostock and Thomas (n 11)

¹⁴ As exceptions of this restrictions in Section 8(1), Section 8(2) of the Contempt of Court Act 1981 stated that “This section does not apply to any disclosure of any particulars— (a) in the proceedings in question for the purpose of enabling the jury to arrive at their verdict, or in connection with the delivery of that verdict, or (b) in evidence in any subsequent proceedings for an offence alleged to have been committed in relation to the jury in the first mentioned proceedings, or to the publication of any particulars so disclosed.”

¹⁵ Section 14 of the Contempt of Court Act 1981

¹⁶ See Ian Cram, ‘Twitt(er)ing open justice?’ in Judith Townend (ed), *Justice wide open: working papers* (1st edition, Centre for Law, Justice and Journalism, 2012) 96

the jury deliberation, there will be no opportunity for parties to challenge the products of jurors' private research.¹⁷ Secondly, if a retrial was ordered because of the outside interference, it will be unnecessarily costly.¹⁸ In addition to this financial loss, Cram has pointed out that, "There will be also a risk of additional trauma for victims and witnesses caught up in the proceedings when they have to return to court at a later date."¹⁹ It could add to these advantages, as New Zealand Law Commission stated that the severe secrecy of jury deliberations may avoid the abuse or assault to the specific juror after the trial by the parties of the trial based on the favoured or unfavoured verdict.²⁰

a.) Revealing the secrecy of jury deliberation to the media and researchers

Section 8 of the Contempt of Court Act 1981 had severely prohibited a juror from revealing the secrecy of jury deliberation to the outside, including to the media. No press investigation into a jury deliberation is permitted once a verdict is launched.²¹ Lord Falconer has pointed out that "The secrecy of the jury's deliberations has long been regarded as a cornerstone of the legal system."²²

Jurors must not discuss anything about their cases with their family and

¹⁷ See Cram (n 16)

¹⁸ Ibid

¹⁹ Ibid

²⁰ See New Zealand Law Commission, 'Juries in Criminal Trials Part Two' (1999) Preliminary Paper No.37(1) <http://www.lawcom.govt.nz/sites/default/files/publications/1999/11/Publication_76_158_PP37Vol1.pdf> accessed 18 February 2015, 58

²¹ See *R v Qureshi* [2001] EWCA Crim 1807, [2002] 1 WLR 518; *Attorney General v Scotcher* [2005] UKHL 36, [2005] 3 All ER 1, [2005] 1 WLR 1867; *Attorney General v Seckerson* [2009] EWHC 1023 (Admin), [2009] EMLR 371, [2009] All ER (D) 106 (May)

²² Charles Falconer, 'Foreword' in Department for Constitutional Affairs, *Jury Research and Impropriety* (1st edition, Consultation Paper CP04/05, 2005) 5

friends.²³ Section 8 of the Contempt of Court Act 1981 had prohibited any enquiry into jury deliberations and made illegal the systematic research of juror by observation and/or recording of their deliberations.²⁴ Secrecy of jury deliberation assures jurors that their discussion will not be revealed and that other people outside will not intimidate them.²⁵ If the secrecy of jury deliberations is assured, the jury will be able to keep their privacy and security.²⁶ As the Lord Chief Justice states that “Our arrangements proceed on the basis that everything that has been said in the course of these discussions must remain confidential to the members of the jury. And because they remain confidential to the jury, and are known to be so, the exchange of frank views and opinions is encouraged.”²⁷

Needless to say, a jury deliberation is the final part of a trial. As the Law Commission indicates, “Prohibiting the disclosure of deliberations prevents the reopening of cases and a subsequent ‘retrial’ by media, especially following an acquittal.”²⁸ Cram and Taylor state that “English courts have long warned against ‘trial by media’ reflecting a concern that sensational and/or selective reporting may prevent defendants receiving a fair trial.”²⁹ As the Law

²³ See the Law Commission, ‘Contempt of Court: A Consultation Paper’ (2012) Consultation Paper No. 209, 64

²⁴ See Lloyd-Bostock and Thomas (n 11) and Zander (n 12) 513

²⁵ See Falconer (n 22) 3

²⁶ See the Law Commission (n 23) 83

²⁷ *Attorney General v Fraill* [2011] EWCA Crim 1570, [2011] 2 Cr App R 21 at [33]

²⁸ The Law Commission (n 23)

²⁹ Ian Cram and Nick Taylor, ‘The Law Commission’s contempt proposals -getting the balance right?’ (2013) 6 Criminal Law Review 465. The previous Attorney General, Dominic Grieve also argued that, “We have never allowed trial by newspaper; and neither do we allow trial by Google.” See Dominic Grieve, ‘Trial by Google? Juries, social media and the internet’ (2013) Speech at the University of Kent 6 February 2013 <<https://www.gov.uk/government/speeches/trial-by-google-juries-social-media-and-the-in>

Commission has pointed out, limits on media coverage are necessary to protect the administration of justice and a fair trial.³⁰ Because of this, jurors are able to express their opinion freely in jury deliberations keeping their privacy “without fear of ridicule or recriminations.”³¹

An old case in relation to this topic is *R v Armstrong* (1922).³² In this case, a juror revealed and published what happened in a jury trial through an interview to some newspapers after the trial was prosecuted. In the case, Lord Hewart stated his opinion in the *obiter dictum* of the judgment; this juror’s action was mostly improper, deplorable and dangerous.³³ According to Williams, this is because Lord Hewart was concerned that disclosures by a juror would damage public confidence in the English jury system.³⁴

Section 8 of the Contempt of Court Act 1981 followed this severe attitude toward the secrecy of jury deliberation. If the law permitted the media to approach any juror during the trial process, reporters could intentionally or unintentionally supply the juror with some information on the case, which might influence the jury’s verdict and create prejudices toward the defendant in the juror’s mind. This would place the fairness of criminal trials at risk. If the media violates the rule, they will need to be punished strictly and face penalties with

[ternet](#)> accessed 8 March 2015

³⁰ See the Law Commission (n 23) 1

³¹ Ibid 83

³² *R v Armstrong* [1922] 16 Cr App R 159

³³ Ibid

³⁴ See Glanville Williams, *The Proof of Guilt* (3rd edition, Stevens & Sons Limited, 1963) 267

heavy fines or jail.³⁵ In so stating this, the Section 8 of the Contempt of Court Act 1981 had sought to avoid any perverse verdicts and assure the credibility of jury deliberations. According to Vidmar, “In practice, reporting constitutes contempt only if the reporting gives rise to a ‘substantial risk’ that the trial will be ‘seriously impeded or biased.’”³⁶

Section 8 of the Contempt of Court Act 1981 had also severely restricted academic research on jury deliberations. For instance, in *Attorney General v Associated Newspapers Ltd*,³⁷ the House of Lords affirmed the judgment to impose a fine on the owners of the *Mail on Sunday* for contempt when they published a juror’s story in the *Blue Arrow* fraud trial. The information was not gathered from the juror directly. It was taken from “transcripts of paid interviews purportedly carried out by a researcher.”³⁸ Nonetheless, the House of Lords recognised that this alleged distance made no difference. It is still contempt, regardless of whether the information about the jury’s deliberation is obtained directly from jurors or indirectly from other people.³⁹

Why had the Contempt of Court Act 1981 so strictly restricted research on jury deliberations? The Government has assumed that if not only the media, but also the researchers make contact with jurors freely, they will influence jury verdicts

³⁵ See Neil Vidmar, ‘A Historical and Comparative Perspective On the Common Law Jury’ in Neil Vidmar (ed), *World Jury systems* (Reprinted edition, Oxford University Press, 2003) 37

³⁶ Ibid

³⁷ *Attorney General v Associated Newspapers Ltd* [1994] 1 All ER 556

³⁸ Zander (n 12) 537

³⁹ See *Attorney General v Associated Newspapers Ltd* (n 37) and Robin Auld, *A Review of the Criminal Courts of England and Wales* (2001) Ministry of Justice 166-68 (The so-called *Auld Report*)

on a case. Moreover, there is no assurance that researchers will not influence the jury both consciously and unconsciously, even if the researchers might be specialists in the jury system and know the rules of secrecy of jury deliberations. The severe restriction on jury research has been legitimised by the court and the Government, in the same way as the media restriction on jury deliberations.⁴⁰ Meanwhile, it cannot be denied that the Section has become a considerable obstacle for academic research on trial by jury.⁴¹ This is because even though academic scholars or researchers hold interviews of the jurors on jury deliberations for academic purposes, no exemptions of this Section have been permitted in England.⁴² Thus, there are many criticisms of severe limitations by Section 8 of the Contempt of Court Act 1981 on academic researches into jury deliberations. For example, Lloyd-Bostock and Thomas have pointed out that, the increasing voices for a relaxation of this severe Section 8 in order to academic researches on the English jury system.⁴³ Zander raised three reasons for the necessity for the relaxation:

One is general 'academic' interest in how an important institution works with no preconceptions and no axes to grind. Another is to test whether the jury system 'works' – is it a sensible process in a sufficiently high proportion of cases

⁴⁰ The sentence which showed the thoughts of the Department of Constitutional Affairs clearly was that “While we welcome consultees’ views on whether research should be permissible into the jury’s deliberations— we believe that research should be subject to adequate safeguards to ensure the administration of justice and the privacy of jurors are adequately protected.” See Department for Constitutional Affairs, *Jury Research and Impropriety* (1st edition, Consultation Paper CP04/05, 2005) 54

⁴¹ See Lloyd-Bostock and Thomas (n 11)

⁴² See Vidmar (n 35) 39

⁴³ See Sally Lloyd-Bostock and Cheryl Thomas, ‘Decline of the ‘Little parliament’ (1999) 62(2) *Law and Contemporary Problems* 7, 12

*to justify its retention. A third is to see whether the jury system or the rules of evidence or the rules of procedure can be improved.*⁴⁴

Zander notes that to meet these requests from the academic establishment, the Runciman Commission suggested that, Section 8 of the Contempt of Court Act 1981 needs to be amended to allow “authorised research”⁴⁵ in the jury deliberation. Conversely, a later Committee chaired by Lord Justice Auld in 1999 that discussed the English jury system, did not concur with it.⁴⁶

Thornton argues that, Section 8 had been a hugely extensive restriction on jury research.⁴⁷ Not only is it ‘extensive’ in this sense, but Section 8 had also raised other problems. There is no way to get information on jury deliberations for academic use other than by acquiring it from judges, lawyers, or police officers.⁴⁸ They are all legal ‘professionals,’ unlike jurors, who are lay people. It is impossible to research and acquire an exact image of the jury as a group of lay people from information gathered from these professionals. In other words, most research on jury deliberation and decision-making by a jury could be hearing from shadow juries or mock juries. These lay people are not the actual jurors, participating in the whole process of jury trial; thus, there are risks that

⁴⁴ Michael Zander, ‘A response: Lord Justice Auld’s Review of the Criminal Courts’ (2001) <https://www.lse.ac.uk/collections/law/staff%20publications%20full%20text/zander/auld_response_web.pdf> accessed 8 March 2015, 15

⁴⁵ Zander (n 12) 513. See also Royal Commission of Criminal Justice, *Royal Commission Report on the Criminal Justice System* (Cmd 2263, 1993) 188. The so-called *Runciman Report*.

⁴⁶ See *Auld Report* (n 39)

⁴⁷ See Peter Thornton, ‘Trial by jury: 50 years of change’ (2004) *Criminal Law Review* 683, 689

⁴⁸ See Zander (n 12) 513

information gathered from them is unreliable. Moreover, as Young predicted that, “Mock juries do not have the responsibility of making real decisions and are not exposed to real defendants and victims.”⁴⁹ Slapper has pointed out that, no proper empirical research on the process of decision-making by a jury in a jury deliberation has been existed, because of the severe restriction by the Section 8 of the Contempt of Court Act 1981.⁵⁰

It cannot be denied that there is a great possibility that a large amount of existing research on the process of trial by jury might be incorrect and unreal. For example, as Zander stated that nobody can predict how frequent serious impropriety occurred in jury deliberations.⁵¹ This constitutes a substantial crisis for academic research on this area. To remedy the situation, there has been a specific proposal to relax the severe restriction. For example, Daly and Pattenden suggested all the jury deliberations should be recorded by tapes routinely.⁵² They put several conditions on this new rule, for instance, tapes should never be released publicly and only the parties can access to an edited transcript from the recording, and the access is permitted by the Court of Appeal if the allegation of bias was plausible.⁵³ However, the theory of the Government has not been changed: “Greater openness carries risks.”⁵⁴ While the Contempt of Court Act 1981 attempted to assure fairness and credibility of jury

⁴⁹ William Young, ‘Summing up to juries in criminal cases – What jury research says about current rules and practice’ (2003) *Criminal Law Review* 665, 669

⁵⁰ See Gary Slapper, *How the Law Works* (3rd edition, Routledge, 2014) 195

⁵¹ See Zander (n 44) 18

⁵² See Gillian Daly and Rosemary Pattenden, ‘Racial bias and the English criminal trial’ (2005) 64(3) *Cambridge Law Journal* 678, 703

⁵³ *Ibid* 703-04

⁵⁴ Department for Constitutional Affairs (n 40) 53

deliberations and protect privacy and secrecy in the trials,⁵⁵ the severe restriction on interview individual jurors has ironically adversely affected potentially useful research that could improve the system of jury trial as a whole.

b.) Pre-publicity influence on a jury

Grieve states that it will be unlikely for a juror to have the opportunities to see prejudiced material, unless they spontaneously researched it.⁵⁶ It is clear that he unfortunately underestimated the facts. As Lieberman et al. suggest, “In high profile trials, the media may report on the person’s background including any prior criminal record, their actions before and after the crime was committed, details of the case, and perhaps most damaging, opinions regarding the likely guilt or innocence of the accused made by legal experts and others. Those commenting on the case may go out of their way to publicly shame and excoriate the suspect/defendant.”⁵⁷ Similarly, Devine has sharply pointed out “A basic question about pretrial publicity is which side it tends to favor, and the answer is: not the defendant’s.”⁵⁸ Lloyd-Bostock’s empirical research clearly

⁵⁵ For instance, the Government emphasises that “an extreme scenario perhaps, but jury service is a public duty not a photo opportunity.” It declares the Government’s unchanged strict position. Ibid 54

⁵⁶ See Dominic Grieve, ‘Speech on the jury system and the challenges it faces, given as part of Politeia’s justice series’ (2013) <<https://www.gov.uk/government/speeches/in-defence-of-the-jury-trial>> accessed 8 March 2015, 15

⁵⁷ Joel Lieberman, Jamie Arndt and Matthew Vess, ‘Inadmissible Evidence and Pretrial Publicity: The Effects (and Ineffectiveness) of Admonitions to Disregard’ in Joel Lieberman and Daniel Krauss (ed), *Jury Psychology: Social Aspects of Trial Processes* (1st edition, Ashgate, 2009) 68

⁵⁸ Dennis Devine, *Jury Decision Making—The State Of The Science* (1st edition, New York University Press, 2012) 72. Ruva et al.’s empirical research indicated that “The results of

confirmed the close relationship between a defendant's previous criminal convictions and a juror's prejudice. She argued that, revealing previous convictions will increase the risk of miscarriage of justice and convicting an innocent person.⁵⁹

Lieberman et al. state that "A variety of remedies have been used to deal with the problem of pretrial publicity, such as delaying the start of the trial with a continuance, moving the trial to a different community, removing biased prospective jurors during *voir dire*, and delivering judicial admonitions to ignore the publicity."⁶⁰ These remedies, however, have been not so efficient or rarely implemented according to them.⁶¹

According to Zander, English law traditionally takes the severe position against publishing pre-trial material by the media.⁶² Section 8 of the Contempt of Court Act required a juror not to be prejudiced by any information except evidence in the trial. Zander states that "It is a principle of fundamental importance both at common law and under the European Convention on Human Rights that the trial of an accused person must not be prejudiced by inappropriate pre-trial publicity or by publication of prejudicial material during the trial itself."⁶³ Even though it is difficult for the court to prove that the media's intention to prejudice and

the experiment indicate that negative pre-trial publicity about a defendant can have an extremely biasing effect on juror decision making." See Christine Ruva, Cathy McEvoy and Judith Bryant, 'Effects of Pre-Trial Publicity and Jury Deliberation on Juror Bias and Source Memory Errors' (2006) 21 Applied Cognitive Psychology 45, 58

⁵⁹ See Sally Lloyd-Bostock, 'The effects on juries of hearing about the defendant's previous criminal record: a simulation study' (2000) Criminal Law Review 734, 754-755

⁶⁰ Lieberman (n 57) 71

⁶¹ Ibid

⁶² See Zander (n 12) 370

⁶³ Ibid

damage a fair trial, the media is liable for contempt of court.⁶⁴ Vidmar stated that by Section 8 of the Contempt of Court Act 1981, English law has severely restricted media reports on jury trials until the time when the judgment is made.⁶⁵ *Attorney General v Birmingham Post and Mail Ltd* was an example of the court's strict attitude towards the media's pretrial publicity. In the trial, the judge discharged a jury because a newspaper article suggested that a murder was carried out by members of a notorious gang although it had not identified any of the defendants.⁶⁶ The court ordered the newspaper company to pay a fine of £20,000.⁶⁷ According to Vidmar, the "impact"⁶⁸ of section 8 of the Contempt of Court Act 1981 involved two elements: "what, when, and how the media may publish materials about court proceedings; and what jurors may disclose about the jury's deliberations."⁶⁹

c.) Private research by a juror in a trial and the jury's Internet and social media use

A Sidney Lumet's *12 Angry Men* (1957) showed that the Juror No.8, played by Henry Fonda, researched evidence to demonstrate his view of the defendant's innocence by privately purchasing a knife. The conscience and passion for fairness and justice of the juror No.8 moved audiences deeply, although the film

⁶⁴ See Zander (n 12) 20. He raises exceptions referring to Section 3(1) and 5 of the Contempt of Court Act 1981.

⁶⁵ See Vidmar (n 35)

⁶⁶ See *Attorney General v Birmingham Post and Mail Ltd* [1997] 1 All ER 456

⁶⁷ Ibid

⁶⁸ Vidmar (n 35) 36

⁶⁹ Ibid

was a fiction. However, if a juror did a similar action to that of Juror No.8 in an English criminal trial, he or she would be accused of contempt of court.

According to *Crown Court Bench Book*, in terms of the principle of the open justice, private research by a juror on evidence is problematic and unfair because the parties in a trial would not be aware of the juror's private research and the parties would not be able to respond to the result of the private research.⁷⁰ In other words, that will result "something that is wholly contrary to the adversarial nature of criminal trial."⁷¹ Therefore, Section 8 of the Contempt of Court Act 1981 strictly prohibited a jury's private research on the case during the jury service term.

According to the Law Commission, contempt of court covers "a wide variety of conduct which undermines or has the potential to undermine the course of justice."⁷² The use of the Internet and social media by a juror could 'undermine the course of justice.'

It would seem impossible for most people not to use the Internet in contemporary English society. According to Thomas's empirical research, 78 per cent of jurors stated that they had used the Internet in some way during their trial.⁷³ Jurors will check emails and information about their interests during their jury service term. Needless to say, the Internet is so convenient for a juror

⁷⁰ See Judicial Studies Board, *Crown Court Bench Book – Directing the Jury* (1st edition, Courts and Tribunals Judiciary, 2010) 9

⁷¹ Cram (n 16) 95

⁷² The Law Commission (n 23)

⁷³ See Ellen Brickman, Julie Blackman, Roy Futterman and Jed Dinnerstein, 'How juror Internet use has changed the American jury' (2008) 1(2) *Journal of Court Innovation* 287, 288

to collect tremendous amounts of information related to the case with minimal effort.⁷⁴

Social media has also been popular in contemporary English society. Kaplan and Haenlein define social media as “a group of Internet-based applications that build on the ideological and technological foundations of [the worldwide web] which allows the creation and exchange of user-generated content.”⁷⁵ Jurors will use social media applications such as Facebook, Twitter, and blogs to communicate with their family and friends.⁷⁶ However, these actions could be problematic in some situations. As the Lord Judge argues that, modern technology has not been invented without any risks.⁷⁷ Therefore, he continues, “In the context of current technology, we must be astute to preserve the integrity of jury trial and the jury system.”⁷⁸

As Grieve asserts that, jurors must not search any extraneous information about the case because they have sworn to find the facts only based on the evidence in their trial.⁷⁹ Therefore, the prospective jurors are required not to “discuss the evidence with anyone outside your jury either face to face, over the telephone or

⁷⁴ See Brickman et al. (n 73)

⁷⁵ Andreas Kaplan and Michael Haenlein, ‘Users of the world, unite! The challenges and opportunities of social media’ (2010) 53(1) *Business Horizons* 61

⁷⁶ According to Thomas, 84 per cent of jurors used the Internet for email check. See Cheryl Thomas, ‘Avoiding the perfect storm of juror contempt’ (2013) 6 *Criminal Law Review* 483,492

⁷⁷ See Lord Judge, ‘Introduction by the Lord Chief Justice’ in the Court of Appeal Criminal Division, *Review of the Legal Year 2010 / 2011* (2011) <<http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/cop-crim-div-review-legal-year-2011.pdf>> accessed 8 March 2015

⁷⁸ Ibid

⁷⁹ Grieve (n 56) 4

over the internet via social networking sites such as Facebook, Twitter or Myspace.”⁸⁰

Unlike a traditional newspaper, it is easy for a juror to search articles in relation to the case online. For example, in *R v McCluskey*, an appeal was affirmed because it revealed that a juror used a mobile phone during the deliberation.⁸¹ In this age of the Internet, a juror can collect information on the case via the Internet that is separate from the evidence in the trial. Such information then flows into jury deliberation. This had been also severely restricted by Section 8 of the Contempt of Court Act 1981. According to empirical research by Thomas, 38 per cent answered ‘YES’ for the question: do you recall any recent news stories about jurors acting improperly? It could be said that this constitutes a substantial rate although Thomas insists it is a small amount.⁸²

According to the Lord Chief Justice, “Even assuming the accuracy and completeness of this information (which, in reality, would be an unwise assumption) its use by a juror exposes him to the risk of being influenced, even unconsciously, by whatever emerges from the internet.”⁸³ Thomas defines that the complex problem; “In high profile cases there are likely to be internet news reports that many jurors cannot avoid, especially for jurors regularly obtain news online or access their emails through websites that contain headline news. This passive awareness is no different from jurors coming across stories in

⁸⁰ HM Courts and Tribunals Service, *Your Guide to Jury Service* (1st edition, 2011) 5

⁸¹ See *R v McCluskey* [1993] Crim LR 976, [1994] Cr App R 216

⁸² See Thomas (n 76)

⁸³ *Attorney General v Fraill* (n 27) at [30]

relation to their case in the print newspapers or on television or hearing reports on the radio.”⁸⁴ The jurors’ passive awareness will occur more frequently than active searching on their verdicts. In the social media age, they may receive “unsolicited tweets”⁸⁵ about the case involuntarily or accidentally. Moreover, Thomas’s empirical research shows that more jurors on high profile cases used the Internet during trials than jurors in standard cases.⁸⁶

According to Thomas, only one per cent of jurors looked for information about parties in the case.⁸⁷ On the other hand, as the Law Commission has pointed out, “The internet and social media may make it easier for friends, families and others to identify and communicate with jurors to solicit information about their jury service.”⁸⁸ The way for a jury to release the information has been changed dramatically in recent years by the frequent use of social media.⁸⁹ Thomas found that three per cent of jurors discussed jury service on Facebook and or Twitter.⁹⁰ Indeed, as the Law Commission states that “The advent of the internet has had a profound impact on a juror’s ability and opportunity to seek or disclose information related to their trial.”⁹¹ These actions create risks of bringing perverse verdicts.

⁸⁴ Thomas (n 76)

⁸⁵ Ibid

⁸⁶ See Cheryl Thomas, *Are Juries Fair?* (1st edition, Ministry of Justice Research Series 1/10, 2010) 43

⁸⁷ See Thomas (n 76)

⁸⁸ The Law Commission (n 23) 84

⁸⁹ According to Ofcom, in March 2012, 64 per cent of the entire online audience in the United Kingdom visited Facebook. In other world, millions citizens in the country has been sharing the information in the use of Facebook. See Ofcom, *Communications Market Report 2012* (1st edition, 2012) 253

⁹⁰ See Thomas (n 76)

⁹¹ The Law Commission (n 23) 63

According to Grieve, it will not necessarily constitute an offence if a juror uses the Internet during their service.⁹² Thomas also maintains it will not constitute contempt immediately even though a juror actively searched for information about the judge, prosecutors and defence teams.⁹³ As the Lord Chief Justice states in the judgment of *R v Frail* that, “The problem therefore is not the internet: the potential problems arise from the activities of jurors who disregard the long established principles which underpin the right of every citizen to a fair trial.”⁹⁴ Moreover, a juror’s social media use has risks to shake the process of judicial decision-making. For instance, in 2008, a criminal juror in a child abduction and assault trial at Burnley Crown Court, Lancashire, posted her Facebook to ask her Facebook ‘friends’ to poll whether the defendants were guilty or not-guilty because she cannot decide.⁹⁵ The court received anonymous report on this juror misconduct, thus the trial judge dismissed her.

As the Law Commission has pointed out, “There is already evidence that some jurors ignore the trial judge’s warnings and actively seek prejudicial material on the internet or in the media about the defendant whom they are trying. Such jurors –who may already have limited respect for the rules of evidence and the need to approach the case with an unbiased perspective– may be reluctant to convict a publisher in respect of publications which prejudice a fair trial, given

⁹² Grieve (n 56) 4

⁹³ Thomas adds that, “It may not be completely desirable.” See Thomas (n 76) 491

⁹⁴ *Attorney General v Frail* (n 27) at [29]

⁹⁵ See Urme Khan, ‘Juror Dismissed from a Trial After Using Facebook to Help Make a Decision’ *The Telegraph* (London, 25 November 2008)
<<http://www.telegraph.co.uk/news/newstoppers/lawreports/3510926/Juror-dismissed-from-a-trial-after-using-Facebook-to-help-make-a-decision.html>> accessed 8 March 2015

that they themselves may be blind to the risk of becoming prejudiced.”⁹⁶ Thus, a juror’s improper use of the Internet would entail miscarriages of justice. The risk of causing miscarriages of justice by a jury would increase if it was approved for a jury to use the Internet and social media during a trial without any efficient restriction by law and the judge’s direction. The Ministry of Justice’s report indicates that, “The consequences of juror misconduct and the availability of prejudicial material online are potentially very serious; miscarriages of justice may arise; giving rise to a risk of the acquittal of the guilty and conviction of the innocent, or may give rise to appeals or aborted trials which prolong the prosecution process and result in substantial costs. There is also a lack of clarity in the legislation for publishers on rules regarding the availability of prejudicial material online, problems which are made worse by the increasing use of the Internet and social media.”⁹⁷ Therefore, the Lord Chief Justice suggests in *R v Dallas*, “Misuse of the internet by a juror is always a most serious irregularity, and an effective custodial sentence is virtually inevitable. The objective of such a sentence is to ensure that the integrity of the process of trial by jury is sustained.”⁹⁸

In addition, the court has severely restricted jurors from using any electronic devices during the trial and deliberation. However, according to the Law Commission, “Different court centres appear to operate different systems in

⁹⁶ The Law Commission (n 23) 25

⁹⁷ Ministry of Justice, *Impact Assessment: Juror misconduct and strict liability contempt by publication* (2014) MOJ 230, 1

⁹⁸ *Attorney General v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991 at [43]

respect of jurors' internet-enabled devices.”⁹⁹ This uncertainty and inconsistency are a problem. Moreover, as Thomas has pointed out, monitoring externally the Internet use by all the jurors during trial is impossible.¹⁰⁰ Cram predicted that it is unlikely to stop the private research by a juror who uses the Internet and social media.¹⁰¹ He stated that “What if, in any given criminal trial, there are four or five jurors who have separately conducted private research and conceal this fact from their co-jurors?”¹⁰² It is necessary to create effective measures by which the court can restrict jurors' Internet and social media use, in order to assure a fair trial and justice.

2.) The contemporary case study of perverse jury verdicts

Lieberman et al. suggest “One clear axiom to emerge from social science research on human behavior is that people's judgments are often fueled, both intentionally and unintentionally, by a wide variety of biases and heuristic processes.”¹⁰³ Indeed, although a trial judge needs to direct a jury not to rely on any facts and information except evidence in the trial, there were some cases in which a juror did not follow the judge's direction, perverted the verdicts and raised miscarriages of justice intentionally and unintentionally. As a classic case

⁹⁹ The Law Commission, *Contempt of Court (1): Juror misconduct and Internet publications* (1st edition, The Stationery Office, 2013) 64-65 (HC860)

¹⁰⁰ See Thomas (n 76) 502-503

¹⁰¹ See Ian Cram, ‘Penalising the googling juror? – Reflections on the futility of Part 3 of the Criminal Justice and Courts Bill (2013-14)’ (2014) UK Constitutional Law Association
<http://ukconstitutionallaw.org/2014/10/02/ian-cram-penalising-the-googling-juror-reflections-on-the-futility-of-part-3-of-the-criminal-justice-and-courts-bill-2013-14/> accessed 8 March 2015

¹⁰² Ibid

¹⁰³ Lieberman et al. (n 57)

of the jury misconduct, it could raise *Vaise v Delaval* in 1785.¹⁰⁴ In this case, two jurors indicated in their affidavits that they tossed a coin to decide their verdicts in the jury deliberation. The court stated that two jurors' action was highly misdemeanor. This section will introduce four well-known contemporary English criminal jury cases, which constituted contempt of court.

R v Young

R v Young was one of the typical examples of perverse jury verdicts.¹⁰⁵ Since the jury could not reach a verdict on the first day of their jury deliberation, jurors were accommodated overnight at a hotel. In the hotel, some jurors used an ouija board in their decision-making process, "purporting to ask questions of and to receive answers from one of the deceased."¹⁰⁶ The defendant, Stephen Andrew Young, was unanimously convicted by the jury of two murders and sentenced as jailed for life. The perverseness of a jury verdict was revealed to the outside by anonymous information from other jurors after the judgment. Therefore, the Court of Appeal allowed the appeal from the defendant against the conviction. The Court of Appeal stated that "The answers obtained from the ouija board went to the heart of the case and were strongly adverse to the appellant, there was a real danger that what had occurred might have influenced some jurors and thereby have prejudiced the appellant."¹⁰⁷ Therefore, the court abandoned the

¹⁰⁴ See *Vaise v Delaval* (1785) 1 Term Rep 11; 99 ER 944

¹⁰⁵ *R v Young (Stephen)* [1995] QB 324, [1995] 2 Cr App Rep 379, CA

¹⁰⁶ Ibid 324

¹⁰⁷ Ibid 325

original verdicts and ordered a new trial. Eventually, the new jury convicted the defendant again, but in a fair trial.

R v Pryce and Huhne

R v Pryce and Huhne in 2013 was one of the most sensational recent cases in the English courts.¹⁰⁸ The defendants were a divorced couple, one of whom was a well-known economist and the other a high-ranking Liberal Democrat politician. The trial has led to a question of the appropriateness of a jury in certain criminal cases.

Vicky Pryce was a senior economist and the ex-wife of Chris Huhne, the previous British Secretary of State for Energy and Climate Change. In March 2003, Huhne was driving a car that was caught speeding by a speed camera on the motorway. If Huhne had taken his penalty points, he would have lost his driving licence since he had already accumulated several penalty points. To avoid damaging his public image, Huhne asked Pryce to accept his speed penalty ticket instead of him. Pryce followed his request and signed the form for police. The form specified that the driver was Pryce, not her husband.

After their marriage collapsed, Pryce revealed some of the facts of this incidence to *The Sunday Times*.¹⁰⁹ Police launched an investigation of the previous couple

¹⁰⁸ *R v Pryce and Huhne*, Southwark Crown Court, Judgment Report, 11 March 2013

¹⁰⁹ See *The Sunday Times* (London, 8 May 2011.) The judge founded her revelation as “a dangerous weapon because it had, in truth, been a joint offence.” See *R v Pryce and Huhne* (n 108) 2

and charged them with the joint offence of perverting the course of justice. Before the Pryce case came to trial, Huhne pleaded guilty, and he resigned his position as a member of the House of Commons. Pryce pleaded not guilty to pervert the course of justice. She insisted Huhne had coerced her to take the penalty points on his behalf. Pryce opted for the defence of marital coercion claiming Huhne offered her no choices at the time.¹¹⁰ The trials of Pryce and Huhne were heard at Southwark Crown Court, London in the early months of 2013.

One unprecedented aspect of the trial was that the jury put ten questions to the trial judge before the fourth day of their deliberations. Prior to the jury deliberations, the judge gave directions and advice for the jury to use when deciding their verdicts. All the questions were on the basic tasks of a jury. The questions made the *R v Pryce and Huhne* case a “fairly unique situation in which the jury attempted to understand the fundamental purpose of their presence.”¹¹¹

One jurors’ question was “whether a juror could reach a verdict based on a reason not presented in court that has no facts or evidence to support it, either from the prosecution or defence.”¹¹² The judge’s answer was ‘definitely NO.’ It was against the jurors’ oath to decide the verdict on anything other than the

¹¹⁰ According to *the Daily Telegraph*, “Marital coercion is a rarely-used defence to criminal offences whereby wives can claim that they were deprived of their freedom to choose by their husbands.” See *the Daily Telegraph* (London, 7 March 2013)

¹¹¹ ‘Vicky Pryce jury discharged in Huhne speeding points case’ *BBC NEWS* (London, 20 February 2013) <<http://www.bbc.co.uk/news/uk-21516473?print=true>> accessed 8 March 2015

¹¹² Ibid

evidence.¹¹³ The jury also asked “Can we speculate about events at the time Vicky Pryce signed the form saying she was the driver or what was in her mind at that time?”¹¹⁴ The answer of the judge was ‘NO’ again. The jurors “were entitled to draw inferences from reliable facts but not speculate, which was guesswork.”¹¹⁵

In addition, the jurors asked “Please advise on which facts in the bundle the jury shall consider to determine a not guilty or guilty verdict.”¹¹⁶ In response, the judge advised the jurors “to review all the evidence to decide which of it you consider to be important, truthful and reliable and then decide what conclusions, common sense conclusions, you can safely draw by way of inference, from that evidence.”¹¹⁷ He continued, “It is not part of my function because I am the judge of the law, not, as you are, the judges of the facts to tell you which piece or pieces of evidence are important and which are not.”¹¹⁸

Some of the jurors’ questions concerned the obvious duties of a jury; others were more peculiar. For example, they asked the judge, “Can you define what is reasonable doubt?”¹¹⁹ The judge answered; “A reasonable doubt is a doubt which is reasonable. They are ordinary English words that the law doesn’t allow

¹¹³ See Joshua Rozenberg, ‘The Pryce of a jury’s failure’ *The Guardian* (London, 21 Feb 2013)

¹¹⁴ Caroline Davies, ‘Vicky Pryce faces retrial after jury ‘fails to grasp basics’ *the Guardian*, (London, 20 February 2013)

¹¹⁵ *Ibid*

¹¹⁶ *Ibid*

¹¹⁷ *Ibid*

¹¹⁸ *Ibid*

¹¹⁹ *Ibid*

me to help you with beyond the written directions that I have already given.”¹²⁰ The jurors also asked, “Would religious conviction be a good enough reason for a wife feeling that she had no choice? [For example,] she promised to obey her husband in her wedding vows and he had ordered her to do something and she felt she had to obey?” The judge answered “This is not, with respect, a question about this case at all.”¹²¹ He added, “Ms Pryce does not say that any such reasoning formed any part of her decision to do what she did and the answer to this question will therefore not help you in any way whatsoever to reach a true verdict in this case.”¹²² In his conclusion, the judge used strong words: “I must direct you firmly to focus on the real issues in this case and thereby to reach a true verdict according to the evidence.”¹²³ Andrew Edis, QC, the prosecutor of the case argued these unprecedented questions clearly indicated that the jurors had not understood the basics of their duty and function.¹²⁴

The jury discussed the trial for thirteen hours and forty-eight minutes, over several days. The judge warned the jury “If for any reason one or more of you feel less than confident that you understand and are able to apply my directions of law, then it would be wholly wrong for any juror in that position to reach a verdict one way or the other.”¹²⁵ Although the judge told the jurors he would accept a majority verdict, they could not lead to a verdict and were discharged

¹²⁰ *BBC NEWS* (n 111)

¹²¹ *Ibid*

¹²² *Ibid*

¹²³ *Ibid*

¹²⁴ See Davies (n 114)

¹²⁵ *Ibid*

from their duties. The judge stated that “the absolute fundamental deficits which the questions demonstrate”¹²⁶ the roles as jurors and the trial process.

After the discharge, the new jury was eventually led to a unanimous guilty verdict. The jurors understood Pryce could have rejected her husband’s order to accept the speeding points if she had really wished to refuse it.¹²⁷ The jury found Pryce was “an accomplice in the scam.”¹²⁸ The court sentenced both Pryce and Huhne to eight-month jail terms.¹²⁹

R v Pryce and Huhne was seen to undermine the credibility of the English criminal jury system. In addition, the trial highlighted several complex aspects of the English criminal jury system. Firstly, at the beginning of a new jury trial, the judge told the new jurors “to put out of their minds anything they had learned of the first jury’s failure to reach a verdict.”¹³⁰ This was not realistic. *R v Pryce and Huhne* was a highly profiled case in England and media had broadcast news about it nearly every day for weeks. It was almost impossible not to assume that the jurors already knew why they were summoned after the discharge of their predecessors and about the unprecedented ten questions at the previous trial. The jury’s duty was to make an effort to lead to a verdict purely based on the evidence they heard in the trial, however it must be difficult for

¹²⁶ Davies (n 114)

¹²⁷ See *the Daily Telegraph* (n 110)

¹²⁸ *The Independent* (London, 8 March 2013)

¹²⁹ Pryce and Huhne both served sixty-two days of an eight-month sentence in jail, then they were released from prisons on 13 May 2013.

¹³⁰ ‘Consider case afresh, Pryce retrial jury told’ *BBC NEWS* (London, 25 February 2013) <<http://www.bbc.co.uk/news/uk-21575600?print=true>> accessed 8 March 2015. The judge maintains “you judge the case afresh...only on the evidence that unfolds before you. The other jury’s disagreement is irrelevant in this case.”

them not to be influenced by information from outside of the court. This raises further doubts for the credibility and fairness of jury trials.¹³¹

Secondly, putting questions to the judge in itself was not unprecedented. The jury is made up of twelve lay people who are not specialists in law. The jury will need to put questions to the judge if there are any points that make them unsure. The judge has a duty to answer the questions regarding legal procedure from the jury by “an effective method,”¹³² eliminate ambiguity, and help the jurors make a fair and credible decision based on the evidence at the trial by using their common sense. In this case, Pryce pleaded not-guilty by ‘marital coercion,’ an antiquated and minor defence. Jurors might not know what ‘marital coercion’ was, or how rarely it occurs in contemporary English criminal trials. The trial judge needed to indicate the exceptional nature of the insistence by Pryce clearly and in detail. Lord Wolf suggests asking the judge about the definition of ‘reasonable doubt’ by the jury in the trial of *R v Pryce and Huhne* was not peculiar since the guidance has changed over the years.¹³³ Moreover, it could be said that not only is it the responsibility of the judge, but also that it is the responsibility of the prosecution and the police to collect evidence and explain the case much more clearly in such a rare ‘marital coercion’ case.

¹³¹ Andrew Edis, the prosecutor of the trial, told the jury “It would be foolish for anyone to pretend that you are all entirely ignorant about the circumstances of this case. There is no such pretence”. He continued “What we also urge you to do is to pay no heed at all to anything that you know about it up until now.” See *BBC NEWS* (n 130)

¹³² Ralph Artigliere, ‘Sequestration for the twenty-first century: disconnecting jurors from the Internet during trial’ (2011) 59 *Drake Law Review* 621, 636

¹³³ See Hayley Dixon, ‘Vicky Pryce ‘inflicted a criminal’ on voters’ *the Daily Telegraph* (London, 21 Feb 2013)

Judges in England have been seen to give their directions more carefully and in greater detail after *R v Pryce and Huhne*. For example, at the trial for William Roache in 2014, Justice Holroyde at Preston Crown Court warned jurors not to be influenced by anger or sympathy for William Roache, a well-known British actor accused of rape and sexual assault on girls aged below sixteen in the late 1960s and early 70s.¹³⁴

Is *R v Pryce and Huhne* an exceptional case in contemporary jury trials? In relation to *R v Pryce and Huhne*, Thomas states that “Empirical evidence shows that this jury was highly exceptional, as hung juries only occur 0.6 per cent of the time when juries deliberate.”¹³⁵ Justice Sweeney, the trial judge of *R v Pryce and Huhne*, states that he had never come across a similar situation in thirty years of his career.¹³⁶ Even though *R v Pryce and Huhne* is counted in this 0.6 per cent and is an ‘exceptional case,’ its social influence signals a need to question the credibility of the English criminal jury system. Joshua Rozenberg, a legal journalist, asserts “It may be time to consider whether we are right to entrust the most serious criminal cases to the hands of unqualified lay people.”¹³⁷ Similarly, Krik has also pointed out that *R v Pryce and Huhne* “has caused some alarm bells to ring—if the members of a jury cannot reach a verdict in what any standards is a simple case, and if they can demonstrate by their

¹³⁴ See *The Times* (London, 4 February 2014.) The trial judge told jurors “Emotions must play no part in your decisions. It would only distract from your solemn duty in accordance with the oath or affirmation you made at the start of the trial to return true verdicts according to the evidence.” Thomas’s empirical research shows the high conviction rate by a jury in rape offence trials. It is convicted more often than trials with other serious offences including attempted murder, manslaughter. See Thomas (n 86) 32

¹³⁵ Thomas (n 76) 495. See also Thomas (n 86) 46

¹³⁶ Grieve (n 56) 4

¹³⁷ Rozenberg (n 113)

questions such a total ignorance of the fundamentals of the jury system, what hope is there?”¹³⁸

It could be said that *R v Pryce and Huhne* has definitely awakened the discussion on the appropriateness of the criminal jury system in twenty-first century England. As Rozenberg commented, “If we start to fall out of love with juries in the future, this case may be seen as the beginning of the end.”¹³⁹

R v Fraill

In summer of 2010, Joanne Fraill, a juror of the trial of Jamie Sewart in the Crown Court at Manchester did private research on the case by the use of the Internet during her jury service.¹⁴⁰ Moreover, she contacted and entered into a conversation with the defendant by Facebook during her jury service. Fraill showed her sympathy for the defendant and told the defendant about the information on the state of the jury deliberation during this Facebook conversation. After the counsel who had acted for Sewart in the trial gave this information to the trial judge, the judge discharged the jury as a whole and summoned the new jury. Regardless of the judge’s warning in the trial of not to use the Internet, Fraill used the Internet and Facebook as a tool of communication with the defendant. The misconduct by Fraill constituted contempt of court against Section 8 of the Contempt of Court Act 1981, and she

¹³⁸ David Kirk, ‘The Jury’s out’ (2013) 77(3) *Journal of Criminal Law* 173, 173

¹³⁹ Rozenberg (n 113)

¹⁴⁰ *Attorney General v Fraill* (n 27)

was arrested. The Lord Chief Justice argues that “Quite apart from the broad considerations of sentences which must protect the jury system generally, the particular features of this defendant's actions are that although many verdicts had already been delivered by the jury, the verdicts overall were still incomplete, and the jury was discharged. Significant public resources were wasted.”¹⁴¹

According to BBC, the trial cost was £6m.¹⁴² Eventually, Fraill was sentenced to an imprisonment for eight months. Although it was indicated that this case is “exceptional,”¹⁴³ through the sentence, the court seemed to ensure the integrity of criminal jury trial.¹⁴⁴

R v Dallas

Theodora Dallas, a university lecturer, read the newspaper that reported the information on the trial and did private research on a case in her home during her jury service for the trial of Barry Medlock at Luton Crown Court in July 2010.¹⁴⁵ Dallas knew that there is a rule that a juror must not research on the case privately nor by the use of the Internet, nevertheless, she did private research by the use of the Internet and told other jurors during the jury deliberation that the defendant in the case had once been accused of rape.¹⁴⁶ As Johnston et al. state that “An incident of this right is that information relating to

¹⁴¹ *Attorney General v Fraill* (n 27) at [54]

¹⁴² See Clive Coleman, ‘Facebook juror sentenced to eight months for contempt’ *BBC News* (London, 16 June 2011) <<http://www.bbc.co.uk/news/uk-13792080>> accessed 8 March 2015

¹⁴³ *Attorney General v Fraill* (n 27) at [1]

¹⁴⁴ *Ibid* at [53]

¹⁴⁵ See *Attorney General v Dallas* (n 98) at [43]

¹⁴⁶ *Ibid*. The defendant was acquitted in that previous rape case. See Dominic Casciani, ‘Jurors could face new Contempt of Court crime’ *BBC News* (London, 9 December 2013)

prior convictions of an accused should not be made available to the jury as it may bias their verdict.”¹⁴⁷ There was no information about the rape among the evidence that was mentioned in the trial. One of the jurors reported this to a court staff before the jury verdict was decided, therefore, the jury was discharged and the trial was restarted by a new jury. The Lord Chief Justice argued that, because of Dallas’s misconduct, the other jurors were suffered by unnecessary time-consuming, and the public was expense was additionally and unnecessary wasted. It obviously damaged the administration of justice.¹⁴⁸ Therefore, Dallas’s misconduct clearly constituted contempt of court, which has been reached to the criminal standard.¹⁴⁹ Dallas was sentenced to six months in jail.

After the judgment, Dallas tried to appeal the case to the Supreme Court, however it was rejected.¹⁵⁰ It should be noted that the problem in the trial was not only limited to Dallas, and there was another male juror who maintained that he had read about the information on the defendant’s previous offence of rape in a newspaper.¹⁵¹

¹⁴⁷ Johnston et al. (n 5) 1. Darbyshire stated that “Jurors may be disproportionately influenced by evidence they are told to ignore and are influenced by previous convictions.” See Penny Darbyshire, ‘Part D: conclusions and recommendations’ in Penny Darbyshire, Andy Maughan and Angus Stewart, *What can the English legal system learn from jury research published up to 2001?: Research Papers in Law* (1st edition, Kingston University, 2002) 65

¹⁴⁸ See *Attorney General v Dallas* (n 98) at [38]

¹⁴⁹ See *Attorney General v Dallas* (n 98) at [39]

¹⁵⁰ The justices state that “The deliberate disobedience of the specific order of the judge not to use the internet unquestionably amounted to contempt of court at common law.” See John Aston and Cathy Gordon, ‘Jailed juror refused leave to appeal’ *The Independent* (London, 26 January 2012)

¹⁵¹ See *Attorney General v Dallas* (n 98) at [29]

3.) Comparison with the rules in the US, Australia and New Zealand

Analysing the jury reform on contempt of court in England, it would be meaningful to consider the questions: if the severe rules of contempt of court committed by jurors have been subject to so much criticism, could it be said that the regulations are peculiar ones only in England? And further, how are the situations in other common law countries? In this section, the Section 8 of the Contempt of Court Act 1981 will be compared with the regulations in the US, Australia and New Zealand on contempt of court committed by jurors.

a.) The rules in the US

Around 80 per cent of all criminal and civil jury trials take place in the United States.¹ Therefore, comparison with the American regulations, which are the standard for the largest population among the common law countries, could be an appropriate and meaningful comparison for an analysis of jury's misconduct and perverse verdicts in England.

According to King, "The American public has always been fascinated by crime and criminals, eagerly consuming news of crime before, during, and even after a prosecution."² Although King has pointed out that, most criminal trials are broadcasted only by local media, high profile cases could be pressed actively by

¹ See Valerie Hans and Neil Vidmar, *Judging the Jury* (1st edition, Plenum, 1986) 31

² Nancy King, 'The American Criminal Jury' in Neil Vidmar (ed), *World Jury systems* (Reprinted edition, Oxford University Press, 2003) 118

the media, the Internet, and social media all over the US.³ For American citizens, jury trials would be more familiar and closer to their life than for the English people. Meanwhile, King has pointed out the concern of the influence of publicity on jury verdicts is much greater than in other countries.⁴ He continues that “A defendant’s inadmissible confession or prior record, the details of the victim’s loss, legal pundits’ speculation about the trial and sentence, reports of rulings made outside the hearing of the jury, and other inadmissible information may be freely broadcast into the homes and delivered to the doorstep of every juror and potential juror prior to and during the trial.”⁵ Why can the media broadcast so freely on information on the defendant and his or her jury trial in the US unlike in England? It is all because of the First Amendment to the US Constitution.

The First Amendment to the US Constitution assures free press, including pre-trial publicity on a defendant and his or her jury trial. This needs to be compatible with the Fifth and Sixth Amendments, which protect a defendant’s right to a fair jury trial. In addition, there is the Federal Rule of Evidence 606(b) which provides that, “During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment.”⁶ However, according to Ruva et al., it is obviously difficult for the

³ See King (n 2) 119-120

⁴ Ibid

⁵ Ibid

⁶ The Federal Rule of Evidence 606(b). Morrison states that the purpose of this rule is to

courts to take the balance between the defendant's Sixth Amendment right to a fair trial and the constitutional guarantee of freedom of the press.⁷ There have been long-standing conflicts and dilemmas between these Amendments.⁸ The First Amendment to the US Constitution guarantees freedom of speech and the press except when 'necessitated by a compelling Governmental interest', and by the measures 'narrowly tailored to serve that interest.'⁹ On the other hand, in the United States, the publicity on the names of juvenile offenders or victims is prohibited.¹⁰ Similarly, the media restrictions to protect privacy rights of sexual assault victims have often been legitimised.¹¹

The wide range of the guarantee of freedom of press and pretrial publicity in the US has a risk of interfering with the defendant's right to a fair jury trial. Vidmar and Hans find that "Compared to jurors who have not been exposed to pretrial publicity, those who read or watch substantial amounts of pretrial publicity about a case in the mass media are more prone to believe the defendant is guilty."¹² In other words, there are foreseeable risks of prejudices in jurors'

assure free discussion fully at the jury deliberation. See Caren Morrison, 'Jury 2.0' (2011) 62(6) *Hastings Law Journal* 1579, 1599

⁷ Ruva et al. continue "In a case where there is a lot of negative pre-trial publicity about the defendant, it may be impossible for that defendant to get a fair trial." See Christine Ruva, Cathy McEvoy and Judith Bryant, 'Effects of Pre-Trial Publicity and Jury Deliberation on Juror Bias and Source Memory Errors' (2006) 21 *Applied Cognitive Psychology* 45, 61

⁸ See Joel Lieberman, Jamie Arndt and Matthew Vess, 'Inadmissible Evidence and Pretrial Publicity: The Effects (and Ineffectiveness) of Admonitions to Disregard' in Joel Lieberman and Daniel Krauss (ed), *Jury Psychology: Social Aspects of Trial Processes* (1st edition, Ashgate, 2009) 68; Dennis Devine, *Jury Decision Making—The State Of The Science* (1st edition, New York University Press, 2012) 72

⁹ See *Richmond Newspapers Inc v Virginia*, 448 US 55 (1980); *Globe Newspaper v Superior Court*, 457 US 596, 606-607 (1982); *Press Enterprise Co v Superior Court*, 478 US 1,13-14, (1986). See also King (n 2) 118-19

¹⁰ See Lieberman et al. (n 8) 74

¹¹ Ibid

¹² Neil Vidmar and Valerie Hans, *American Juries the Verdict* (1st edition, Prometheus

minds by pre-trial publicity. Ruva et al. have pointed out that, “Even if jurors are instructed not to use information contained in the pre-trial publicity to make decisions about guilt, they may be unable to do so because of source memory errors or negative impressions they have formed about the defendant. If jurors are mistakenly using information provided in pre-trial publicity to make verdict decisions, then the defendant cannot receive a fair trial.”¹³

To resolve these risks, Devine suggests several ways for a judge to maintain a fair trial without any prejudice from pretrial publicities: *voir dire*, continuance, judge instructions to jurors, and change of the venue of trial.¹⁴ In England, *voir dire* called ‘the trial within a trial.’ it is the process to examine the admissibility of contested evidences and witnesses to exclude prejudicial ones for a jury.¹⁵ However, in the US, *voir dire* means the process for attorneys to select or reject certain prospective jurors to hear the case.¹⁶ They will choose the most ideal, appropriate and preferable jurors for each parties in the case. Thompson has pointed out that the length of time for *voir dire* in the US is more prolonged than in England: it sometimes takes more than 20 days in the states, although it generally takes less than an hour in England.¹⁷ During *voir dire* in the US, the judge (in some cases the attorneys) asks prospective jurors several questions in order to examine their qualification as jurors, and to confirm whether they

Books, 2007) 111

¹³ Ruva et al. (n 7)

¹⁴ See Devine (n 8)

¹⁵ *Voir dire* originally means ‘to speak the truth’ or ‘true talk’ in Anglo-French. See Stephen Adler, *The Jury: Disorder in the Courts* (1st edition, Doubleday, 1994) 56

¹⁶ Ibid

¹⁷ See E.P. Thompson, ‘Subduing the Jury’ (1986) 8(21) *London Review of Books* 7, 12

prejudice the defendant and cases that would damage the fair jury trial.¹⁸

Sometimes, jury selection consultants will support the judge and attorneys with the development of such questionnaires.¹⁹ According to Lieberman and Olson, “Rather than relying on gross generalisations of groups of individuals, jury selection consultants attempt to identify backgrounds and attitudes of individuals who live in the jurisdiction from which the jury will be drawn that are relevant to the specific case at hand.”²⁰

In the US, the *voir dire* procedure tends to be viewed as a very significant element to the result of a trial, although a social science research asserted that the characteristics of a juror do not have strong influence on jury verdicts.²¹ As Ruva et al. have pointed out, “It is important to investigate whether jurors can discriminate between information presented at trial and information presented prior to trial. If jurors cannot discriminate between these two sources of information this is extremely problematic for our criminal justice system.”²² To make jurors to distinguish real evidences and their unrealised prejudice, a judge’s instructions to a jury could be said important role.

Through the *voir dire* procedure, the jurors who have been influenced by pre-publicity on the case and got a conscious or unconscious prejudice can be

¹⁸ See Joel Lieberman and Jodie Olson, ‘The Psychology of Jury Selection’ in Joel Lieberman and Daniel Krauss (ed), *Jury Psychology: Social Aspects of Trial Processes* (1st edition, Ashgate, 2009) 98. From these descriptions, it is clear that the word “*voir dire*” in the US has been used as different meaning from the English and Northern Irish *voir dire*.

¹⁹ Ibid 111

²⁰ Ibid 108

²¹ Ibid 118

²² Ruva et al. (n 7) 47

examined and excluded from the jury panel by means of challenge for cause or a peremptory challenge.²³ If expressed information or opinions by a juror seems to indicate the person has been prejudiced in the *voir dire* process, an unlimited number of challenges for cause could have been approved by the judge's discretion: this is a challenge for cause.²⁴ If the parties feel a strong suspicion that a juror is prejudiced without any clear evidence to testify such a doubt, they will not need to state any reason for eliminating the certain amount of jurors: this is a peremptory challenge.²⁵ After the jury selection, the judge will instruct jurors to follow his or her instructions not to pay attention to media information or other discussions of the case during their jury service, "subject to dismissal from the jury should they disobey."²⁶

In addition, if there is any necessity, the court will not reveal the names and addresses of jurors to the parties and the press. In so doing, a juror will be relieved from any approach by parties, the family and friends of the parties, and/or media reporters.²⁷

According to King, the court can prohibit the media and others from approaching jurors and pressing information on jury trial and deliberation in most cases.²⁸ For instance, in *United States v Cleveland*, the judgment stated

²³ See *Press Enterprise Co. v Superior Court* (n 9) 14. Lieberman et. al. suggest "A juror may be unaware as to the extent they have been biased by pretrial publicity and inaccurately claim impartiality." See Lieberman et al. (n 8) 72

²⁴ See Lieberman and Olson (n 18) 99

²⁵ The defence side tends to be approved to exclude more jurors by peremptory challenges.

²⁶ King (n 2) 119

²⁷ Ibid

²⁸ Ibid

that no juror shall be interviewed by anyone on the jury deliberation without a judge's special order.²⁹ However, it is not prohibited for a juror to release the information on the jury trial after the trial has been finished. Even though a judge could take several measures for avoiding unfairness in a jury trial which are compatible with the guarantee of freedom of press and pre-publicity, is it easy for a judge to control jurors' actions which reveal information on jury trial and deliberation to the outside including the media after the trial finished?³⁰ In a similar manner as a juror, it has been legitimised by the Supreme Court to restrict an attorney not to comment on any details about a jury trial after it has been finished by rules of professional conduct in many states.³¹

It is needless to say that the Internet and social media are actively used as a popular communication tool in the US as well as in England. For instance, according to Grow, a tweet referring to 'jury duty' was posted almost every three minutes.³² He argues, the juror's Internet and social media use has frequently resulted serious perverse jury verdicts and caused numerous difficulties for court management by the judge.³³ Against this new risk of perverse verdicts, American courts seem to be not wholly prepared.³⁴ In *United States of America v Frank Hernandez et al.* at US District Court for the Southern District of Florida in 2009, after the jurors were retired and ready to

²⁹ See *United States v Cleveland* 128 F.3d 267 (5th Cir. 1997)

³⁰ See King (n 2) 119

³¹ See *Gentile v State Bar*, 501 US 1030 (1991); Ibid 120

³² See Brian Grow, 'As Jurors Go Online US Trials Go Off Track' *Reuters* (Atlanta, 8 Dec 2010)

³³ Ibid; Amy Eve and Michael Zuckerman, 'Ensuring an impartial jury in the age of social media' (2012) 11 *Duke Law and Technology Review* 1, 2

³⁴ See Gareth Lacy, 'Untangling the Web: How courts should respond to juries using the Internet for research' (2011) 1(2) *Reynolds Court and Media Law Journal* 169, 169

start their jury deliberation, one of the jurors came back to his home and researched on the complex terminologies which were mentioned in the trial by the use of the Internet.³⁵ This was reported by another juror to the judge. After the judge enquired each of jurors whether they used the Internet to research about the case, a surprising fact was exposed: eight of twelve jurors did their own Internet research.³⁶ Therefore, the judge discharged the trial. One of the possible inducements for the jurors' Internet research was because there were frequent medically complex testimonies.³⁷ In a trial in Macomb County, Michigan in 2010, a juror, Hadley Jons, had posted on Facebook: "Excited for jury duty tomorrow...it's gonna be fun to tell the defendant they're guilty.: P."³⁸ It was revealed before the verdict, thus, she was convicted of contempt. She was given a sentence with \$250 fine; moreover, the court imposed the defendant on writing a five-page essay on the Sixth Amendment of the US Constitution.³⁹ For another example, in *Dimas-Martinez v State*, a juror had continuously tweeted in the middle of a criminal trial ignoring the trial judge's admonition which prohibited the Internet and social media use during the trial.⁴⁰ Although the trial judge knew and warned the juror's tweeting, the trial judge did not discharge the juror, and eventually jurors returned the guilty verdicts for a

³⁵ See *United States of America v Frank Hernandez et al.* Case No. 07-60027-CR-ZLOCH (SD Fla, Jan 20, 2009)

³⁶ The eight jurors searched the defendant's name and medical terms, etc. See Dierdra Funcheon, 'Jurors Gone Wild' *Miami New Times* (New York, 23 April 2009) <<http://www.miaminewtimes.com/2009-04-23/news/jurors-and-prosecutors-sink-a-federal-case-against-internet-pharmacies/>> accessed 8 March 2015

³⁷ See *United States of America v Frank Hernandez et al.* (n 35); Funcheon (n 36)

³⁸ Gary Slapper, '10 Remarkable jury cases' *The Times* (London, 30 January 2014)

³⁹ The Sixth Amendment of US Constitution has assured a defendant's right to a fair and impartial jury. See Slapper (n 38)

⁴⁰ See *Dimas-Martinez v State*, No. CR 11-5, 2011 WL 6091330, (Ark 8 Dec 2011) at [12]

defendant sentencing a death penalty.⁴¹ The Arkansas Supreme Court reversed the judgment and criticised the trial judge who underestimated the juror misconduct and failed to prevent the significant risk of prejudice and miscarriage of justice.⁴²

Conversely, in *Commonwealth v Werner*, the trial judge did not order any retrials, although it was exposed that some jurors used social media and posted articles related to their ‘annoying’⁴³ jury services on their Facebook which has been publicly sighted during the trial. After the defendant had convicted by a jury verdict, this fact was identified by the defence counsel through reading media reports about some jurors’ inadequate social media use.⁴⁴ Nonetheless, the trial judge did not find the posted information on their Facebook was something which should change the convicted verdicts for the defendant, and the Massachusetts Appeals Court judge affirmed the judgment.⁴⁵ According to the Appeals Court judge, “Although the posts examined by the judge appeared on open profiles on Facebook, and were thus accessible by any of the millions of Facebook members, there was no identifying information in any of the posts about the particular defendant or crime; and the judge credited the jurors’ testimony that they had not been exposed to any extraneous information in any

⁴¹ See *Dimas-Martinez v State* (n 40) at [1]

⁴² Ibid at [16]-[17]

⁴³ See *Commonwealth v Werner* 81 Mass App Ct 689 (1 February 2012), 691

The jurors showed their complaints on the length and burdensome of the jury service and they posted that they wished the trial would be decided as soon as possible on their Facebook.

⁴⁴ Ibid

⁴⁵ Ibid

other postings or responses.”⁴⁶ This generous position of the court could be said quite different from the severe attitude towards juror’s Internet and social media use in England. On the other hand, these cases have surely made us realised how the Internet and social media are challenging centuries-old American criminal jury trial rules.⁴⁷

In the US, there are so-called ‘google mistrials’ when jurors did research on the trial by the use of the Internet and it led to a retrial.⁴⁸ Morrison argues that, a juror’s Internet research on the case “may not reflect misconduct so much as a misplaced sense of responsibility to render the ‘right’ decision.”⁴⁹ On the other hand, a judge may order to remove a juror’s electronic communication devices to prevent them accessing the Internet and social media. According to Johnston et al., many courts in the US collect electronic devices from jurors both in the courtroom and the jury deliberation room.⁵⁰ However, there is a limitation for a judge’s ability to restrict a juror’s Internet and social media use after the trial. For example, in *Commonwealth v Werner*, after the trial, two jurors posted their comments to Facebook about their jury service and one juror blogged on the case.⁵¹ Although, the Massachusetts Appeals Court refused to set aside the

⁴⁶ *Commonwealth v Werner* (n 43) 699

⁴⁷ See Funcheon (n 36)

⁴⁸ See the Law Commission, ‘Contempt of Court: A Consultation Paper’ (2012) Consultation Paper No. 209, 71; John Schwarz, ‘As jurors turn to web, mistrials are popping up’ *The New York Times* (New York, 17 March 2009) <http://www.nytimes.com/2009/03/18/us/18juries.html?pagewanted=all&_r=0> accessed 8 March 2015

⁴⁹ Morrison (n 6) 1581

⁵⁰ See Jane Johnston, Patrick Keyzer, Geoffrey Holland, Mark Pearson, Sharon Rodrick, and Ann Wallace, *Juries and Social Media: a report prepared for the Victorian Department of Justice* (1st edition, The Standing Council on Law and Justice, 2013) 22

⁵¹ See *Commonwealth v Werner* (n 43)

conviction because of overwhelming evidence of the guilt of the accused, this case shows courts cannot manage the jurors' friendship after the trial and stop releasing information on the trial.

If there is any necessity for avoiding risks of perverse verdicts, a judge can order a change of venue to a different located court.⁵² However, this mean is criticised as a less realistic measure, because this may weaken the juror representativeness.⁵³ Moreover, even if the location of the trial has been changed, if jurors could connect the Internet using mobile phone, it will be less efficient to avoid jury's misconduct and perverse verdicts.

Although the court has taken various measures to avoid a prejudiced jury, an unfair jury trial for a defendant could be caused by the pre-publicity and revealing of sensitive information from jury deliberation to the outside by the Internet and social media use. As King maintained, "In any event, many basic features of the criminal jury in the Unites States cannot be modified without either constitutional amendment or radical reinterpretations of the Bill of Rights."⁵⁴ This is a controversial feature of the rules of contempt of Court in the US; it is used to support the severe restriction of disclosing the secrecy of jury deliberation by Section 8 of the Contempt of Court Act 1981 in England.

⁵² See King (n 2) 119. Lieberman et al. suggest "In the United States, Constitutional guarantees that a defendant will receive a speedy trial in the district where a crime was committed, combined with the logistical difficulties of moving a trial to a different location cause these remedies to be rarely used." See Lieberman et al. (n 8) 72

⁵³ See Johnston et al. (n 50)

⁵⁴ King (n 2) 124

b.) The rules in Australia

Australia, as one of the largest Commonwealth countries, has unique regulations on a juror's misconduct and contempt of court. In New South Wales, Western Australia, South Australia, Queensland and the Australian Capital Territory, there are laws that introduce a judge-only trial in indictable offences.⁵⁵ The courts must consider whether the case “involves a factual issue that requires the application of objective community standards including (but not limited to) an issue of reasonableness, negligence, indecency, obscenity or dangerousness,”⁵⁶ “the length or complexity or both,”⁵⁷ and “any risk that the jury will be corrupted or intimidated.”⁵⁸ If the case satisfied those criteria, the court would apply a non-jury criminal trial. To apply a non-jury criminal trial, the accused's consent is needed, except in Queensland.⁵⁹ From 2004 to 2008, 56 per cent of indictable-only criminal cases in the Australian Capital Territory had been heard at non-jury trial; this was the highest proportion of trial by judge alone in the whole Australia.⁶⁰

⁵⁵ See Section 132 of the Criminal Procedure Act 1986 (New South Wales), Section 118 of the Criminal Procedure Act 2004 (Western Australia), Section 68B of the Supreme Court Act 1933 (the Australian Capital Territory) and Section 7 of the Juries Act 1927 (South Australia.) In Australian Capital Territory and Queensland, a non-jury trial is available when the case is in less serious indictable offences except murder, manslaughter and sexual assaults. See Section 68B of the Supreme Court Act 1933 (the Australian Capital Territory) and Section 614 and 615 of the Criminal Code Act 1899 (Queensland)

⁵⁶ See Section 132(5) of the Criminal Procedure Act 1986 (New South Wales), Section(6) of the Criminal Procedure Act 2004 (Western Australia) and Section(5) of the Criminal Code Act 1899 (Queensland)

⁵⁷ See Section 118 (5)(a) of the Criminal Procedure Act 2004 (Western Australia) and Section 615(4)(a) of the Criminal Code Act 1899 (Queensland)

⁵⁸ See Section 132(7)(a) of the Criminal Procedure Act 1986 (New South Wales), Section 118 (5)(b) of the Criminal Procedure Act 2004 (Western Australia) and Section 615(4)(b) of the Criminal Code Act 1899 (Queensland)

⁵⁹ See Section 614 and 615 of the Criminal Code Act 1899 (Queensland)

⁶⁰ The second high rate was the South Australian Supreme Court at 15 per cent and the

In Queensland, a pre-trial publicity that may affect jury deliberations is restricted as a risk factor and may be the reason for the application for non-jury criminal trial.⁶¹ In Victoria, publishing any statements made, opinions expressed, arguments advanced or votes cast during jury deliberation, or to solicit or obtain such information from a juror.⁶² In New South Wales and the Australian Capital Territory has similar restrictions towards the disclosure of the jury deliberation.⁶³ The difference from the English Section 8 of the Contempt of Court Act 1981 is that the Information on jury deliberation may be solicited for research purposes when the Attorney General permitted both in Vitoria and New South Wales.⁶⁴

Recently, the new menace for a fair criminal trial in Australia would be a juror's Internet and social media use. In New South Wales, the Schedule 1.8 of the Courts and Other Legislation Further Amendment Act 2013 specifically prohibits a juror's Internet and social media use. However, how can the court identify a juror's misconduct on the use of the Internet and social media? According to Burd and Horan, there is a theory, which suggests the creation of an independent monitoring role on a juror's Internet and social media use in a

third was Western Australia at 2.7 per cent. See Attorney General Simon Corbell's statement; Australian Capital Territory, *Parliamentary Debates Hansard* (17 February 2011) Week 1 Legislative Assembly 256

⁶¹ See Section 615 (4)(c) Criminal Code Act 1899 (Queensland)

⁶² See Section 7(2) of the Juries Act 2000 (Victoria)

⁶³ See Section 68(a) of the Jury Act 1977 (New South Wales) and Section 42(c)(1)-(4) of the Juries Act 1967 (Australian Capital Territory)

⁶⁴ See Section 71(9) of the Juries Act 2000 (Victoria), Section 68(a)(3) of the Jury Act 1977 (New South Wales) and Section 42(c)(5)-(7) of the Juries Act (Australian Capital Territory)

trial.⁶⁵ However, as Johnston et al. have pointed out, monitoring a juror's Internet and social media use would be difficult in terms of money and time costs.⁶⁶ They also suggested that, sequestering a jury in a hotel during its jury service term to restrict access to the Internet and social media, although they have affirmed it is also an expensive method.⁶⁷ Hoffmeister concurs with this idea and states that sequestration is the best mean to assure juror's impartiality among the existed possible measures.⁶⁸ However, in addition to the cost problem, there will be a question as to whether it is an appropriate burden for a jury to be so limited in its freedom of movement. In a manslaughter trial in the Supreme Court of Queensland, Justice George Fryberg allowed defence lawyers to ask the jurors whether any pre-trial publicity influenced their verdicts and whether they had prior knowledge on the defendant and the case.⁶⁹ The purpose for the questions was to examine the jurors' possible prejudice.⁷⁰

The cost matters have been difficult for the Australian court to avoid juror misconduct and perverse verdicts. It could be said that the role, instruction and flexible discretion of a judge to examine a juror's misbehavior including the use of the Internet and social media has increased in its significance to achieve a fair criminal trial in Australia.

⁶⁵ See Roxanne Burd and Jacqueline Horan, 'Protecting the right to a fair trial – has trial by jury been caught in the world wide web?' (2012) 36 Criminal Law Journal 103, 122 and 165-6

⁶⁶ See Johnston et al. (n 50) 21

⁶⁷ Ibid

⁶⁸ Hoffmeister continues "This is because the court has direct control of the jurors' environment." See Thaddeous Hoffmeister, 'Google, gadgets and guilt: juror misconduct in the digital age' (2012) 83(2) University of Colorado Law Review 409, 441

⁶⁹ See Mark Oberhardt, 'Patel trial jury to be polled for bias' *the Daily Telegraph* (London, 4 February 2013)

⁷⁰ Ibid

c.) The rules in New Zealand

As same as in England, the rate of the use of jury trial in all criminal cases in New Zealand is less than one percent.⁷¹ However, among the Commonwealth countries, the media regulation from the secrecy of jury deliberation in New Zealand is noteworthy since the court has attempted to avoid jury's perverse verdicts cooperating with the media. As in England, New Zealand has a tradition of severe restriction toward the disclosure of jury secrecy to protect a fair jury trial and justice from the approach by the outside influences including the media.

However, there is no provision in New Zealand, which is the equivalent of Section 8 of the Contempt of Court Act 1981. In New Zealand, Section 370(2) of the Crimes Act 1961 merely prohibits any communication with a juror by any person except the court officer before the jury deliberation. The breach of the Section 370(2) will result in the discharge of the jury and the retrial by a new jury.⁷² As the New Zealand Law Commission stated that "Jury secrecy in New Zealand rests on convention rather than law: jurors are not required to take an oath of secrecy but are directed by the trial judge that the case should only be discussed with other jurors."⁷³ The severe restriction will not be strengthened

⁷¹ The conviction rate by jurors in New Zealand was 72.9 per cent according to Young et al.'s empirical research. See Warren Young, Neil Cameron and Yvette Tinsley, *Juries in Criminal Trials Part Two* (1999) New Zealand Law Commission Preliminary Paper No.37(2)
<http://www.lawcom.govt.nz/sites/default/files/publications/1999/11/Publication_76_159_PP37Vol2.pdf> accessed 8 March 2015, 1 and 68

⁷² See *R v Parkinson* (1915) 34 NZLR 636, 639 and *R v Davis* [1960] Cr App R 235, 240

⁷³ New Zealand Law Commission, 'Juries in Criminal Trials Part Two' (1999) Preliminary

by any provision like Section 8 of the Contempt of Court Act 1981, and only the court judgment has an authority to prohibit the disclosure of the secrecy of jury deliberation to the outside including the media.⁷⁴

The restriction towards the publicity on the case during and after the trial and jury deliberations is more restrictive in New Zealand than in the US.⁷⁵ For example, in *Solicitor General v Radio New Zealand* in 1994, several months after the jury verdict was returned, the Radio New Zealand interviewed some of the jurors of the trial of David Wayne Tamihere who murdered two Swedish tourists and transmitted the jurors' comments; The radio company was eventually convicted as contempt of court and fined \$30,000.⁷⁶ This case caused a criticism that the violation of rights to freedom of expression of the broadcasters based on Section 14 of the New Zealand Bill of Rights Act 1990.⁷⁷

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<http://www.lawcom.govt.nz/sites/default/files/publications/1999/11/Publication_76_158_PP37Vol1.pdf> accessed 8 March 2015, 65

⁷⁴ For instance, see *R v Papadopoulos* [1979] 1 NZLR 621, 626; *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 45, 2 LRC 116; *R v Norton-Bennett* [1990] 1 NZLR 559 (CA)

⁷⁵ See Neil Cameron, Susan Potter and Warren Young, 'The New Zealand Jury: Towards Reform' in Neil Vidmar (ed), *World Jury systems* (Reprinted edition, Oxford University Press, 2003) 206

⁷⁶ See *Solicitor-General v Radio New Zealand* (n 74). In the interviews, a juror mentioned doubts about the guilty verdicts because further evidence has been emerged after the trial. Conversely, other interviewed jurors had no doubts about the verdict. See Ursula Cheer, 'Contempt: Testing the Boundaries in Relations to Juries' (2012) *Thomson Reuters New Zealand* <<http://insider.thomsonreuters.co.nz/2012/11/contempt-in-relation-to-juries/>> accessed 8 March 2015

⁷⁷ Section 14 of the New Zealand Bill of Rights Act 1990 which provided "Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form." The judge in *Solicitor-General v Radio New Zealand Ltd* (n 74) argued the Radio New Zealand violated Section 25(a) of the Act which ensured the rights to a fair and public hearing by an independent and impartial court. See Anthony Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) <http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf> accessed 8 March 2015, 13-14

On the other hand, the media is free to report on pretrial court proceedings in New Zealand.⁷⁸ In terms of that, restrictions in New Zealand on the pre-publicity is much more generous than English contempt of court law. Moreover, in New Zealand, there is no regulation which prohibits responsible academic research on jury unlike in England.⁷⁹

Cameron et al. suggest that, in New Zealand, “Name suppression also is granted only infrequently (although more often prior to trial than subsequent to it), and rarely on the grounds that it will prejudice the subsequent trial.”⁸⁰ Moreover, according to Cameron et al., contempt proceedings are actually very rare in New Zealand.⁸¹ They asserted that, “The Solicitor General attempts to work cooperatively with the media to establish the parameters of appropriate publication, and prosecutes only when the case is a serious one and the breach is considered to be a blatant and gross one.”⁸² The establishing of a standard of appropriate broadcasting on jury trials to achieve a fair trial and justice is very significant. New Zealand’s model could be a good example for a reform of the regulation on contempt of court which could be compatible with freedom of press in England.

⁷⁸ See Cameron et al. (n 75)

⁷⁹ See New Zealand Law Commission (n 73) 63

⁸⁰ Cameron et al. (n 75)

⁸¹ Ibid 199

⁸² Ibid

4.) The suggestion by the Law Commission and the Criminal Justice and Courts Act 2015

In each English criminal case, judges set out what a juror must not do and the breach of this can constitute contempt of court.⁸³ However, the contemporary English cases clearly showed that Section 8 of the Contempt of Court Act 1981 had not reflected contemporary developments, particularly in relation to the new technology including the Internet and social media.⁸⁴ For the purpose of reacting to the progress of digital media and communication technology, and for confirming the compatibility with the European Convention on Human Rights, The current coalition Government asked the Law Commission to examine the law of contempt of court and juror misconducts.⁸⁵

Based on the Law Commission's prepared report, the current coalition Government suggested the Criminal Justice and Courts Bill on the jury reform in 2013 "to ensure that the law and criminal procedures strike a balance between the public interest in the administration of justice, the defendant's right to a fair trial, the rights of publishers to freedom of expression and the rights of jurors."⁸⁶

⁸³ See Dominic Casciani, 'Jurors could face new Contempt of Court crime' *BBC News* (London, 9 December 2013)

⁸⁴ See House of Lords, 'Explanatory Notes: Criminal Justice and Courts Bill' (2014) 13

⁸⁵ See Cheryl Thomas, 'Avoiding the perfect storm of juror contempt' (2013) 6 *Criminal Law Review* 483, 483. The specific aim of the Commission was "to respond to pressing, practical problems with certain areas of the law of contempt, with a view to recommending reforms that could maintain public confidence in the due administration of justice, whilst also making the law clear, fair, modern and practicable." See the Law Commission, *Contempt of Court (1): Juror misconduct and Internet publications* (1st edition, The Stationery Office, 2013) 2 (HC860)

⁸⁶ Ministry of Justice, *Impact Assessment: Juror misconduct and strict liability contempt by publication* (2014) MOJ 230, 1

After the nearly two-year discussion at the House of Parliament, the Criminal Justice and Courts Act 2015 was just enacted by receiving Royal Assent at 12 February 2015.

At last, the Law Commission has suggested forcing jurors to take more strict liability on their contempt and misconducts.⁸⁷ As the Law Commission states that the number of the cases of jury contempt is fundamentally not so great, however there is a risk that jurors could come across prejudicial material coincidentally and contaminate a fair jury trial and decrease public confidence.⁸⁸ The Law Commission suggests “Juries must not only be impartial in fact but also must be seen to be so.”⁸⁹

In addition, the Law Commission has pointed out that, the significance of consistency in restrictions to juror misconduct.⁹⁰ It is because there is a need for a jury to be subject to standard rules to avoid confusion and inconsistency.⁹¹ Specifically said, the Law Commission suggested creating four offences of juror misconduct and reforming the law on contempt by publication.⁹²

The Commission states that in so doing, “A discrete offence could send an important message to jurors about the seriousness with which such conduct is regarded. It may also have other benefits, such as providing greater clarity about

⁸⁷ See House of Lords (n 84)

⁸⁸ See the Law Commission (n 85) 36-37

⁸⁹ Ibid

⁹⁰ Ibid 67

⁹¹ See Casciani (n 83)

⁹² See House of Lords (n 84)

what is and is not permitted than the present law.”⁹³ Moreover, the Commission provides that, “The deviance will result in the disqualification from jury service for ten years for a person who has been found guilty of a contempt offence.”⁹⁴ David Ormerod, the Law Commissioner heading the contempt project, suggests that, “Jurors accused of contempt would benefit from the normal protections of the criminal trial process.”⁹⁵

The Law Commission predicted the concern that “Creating such an offence would make jurors more reluctant to admit their misconduct and their fellow jurors more reluctant to report any concerns, which would actively work against uncovering cases of miscarriages of justice.”⁹⁶ This negative opinion has pointed out the difficulty for the court to discover jurors’ misconducts.⁹⁷

In addition, Grieve suggested that, “Juror contempt is a serious risk to justice but people are often not aware of the consequences.”⁹⁸ It was difficult for a judge to direct “about what jurors can and cannot do, and threatening to imprison them for breaching the order.”⁹⁹ To avoid “these conflicting tensions,”¹⁰⁰ the introduction of the new statutory criminal offence is the best solution according to the Law Commission.

⁹³ The Law Commission (n 48) 76

⁹⁴ Ministry of Justice (n 86)

⁹⁵ Casciani (n 83)

⁹⁶ The Law Commission, (n 48) 77

⁹⁷ Ibid

⁹⁸ Casciani (n 83)

⁹⁹ The Law Commission (n 85) 68

¹⁰⁰ Ibid

The proposal was realised as Sections in the Criminal Justice and Courts Act 2015. The Section 74(2) of the Criminal Justice and Courts Act repealed the Section 8 of the Contempt of Court Act 1981. This could be evaluated as a huge reform in these three decades flow of the discussion against the Section 8 of the Contempt of Court Act 1981. However, the new Act remained its severe attitudes towards the juror's private research and disclosure of jury deliberation as same as the Section 8 of the Contempt of Court Act 1981.

For instance, The Section 71 to 74 of the Act made “researching details of a case (including online research,) sharing details of the research with other jurors, disclosing details of juror deliberation and engaging in other prohibited conduct”¹⁰¹ new offences. The current Lord Chancellor and Secretary of State for Justice Chris Grayling MP states that the purpose of providing four new criminal offences of juror misconduct in Section of Criminal Justice and Courts Act 2015 is “to ensure fair trials and prevent miscarriages of justice.”¹⁰²

Firstly, Section 71 of the Act newly made an offence for a juror “that tries an issue in a case before a court to research the case during the trial period.”¹⁰³ It penalise a juror only if he or she intentionally sought information when he or she knew or should reasonably knew that the information is or might be related

¹⁰¹ Ministry of Justice, ‘No more “early release” for child rapists and terrorists’ (2015) <<http://www.wired-gov.net/wg/news.nsf/articles/No+more+early+release+for+child+rapists+and+terrorists+13022015152000?open>> accessed 8 March 2015

¹⁰² Ibid

¹⁰³ See Section 71(3) of the Criminal Justice and Courts Act 2015. The “trial period” means the term from a person's oath as a juror to the discharge of him or her by the judge. Ibid

to the case.¹⁰⁴ In other words, if the information is irrelevant to the case, the juror will not be penalised.¹⁰⁵ The Section specifically illustrated the methodology of a juror's research; asking a question, searching an electronic database, including by means of the Internet, visiting or inspecting a place or object, conducting an experiment, and asking another person to seek the information.¹⁰⁶ Secondly, if a juror intentionally shared such an information above with other jurors, it will also consist an offence.¹⁰⁷ Thirdly, the Criminal Justice and Courts Act 2015 also made disclosing the contents of jury deliberation an offence. A juror who intentionally "disclosed information about statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in proceedings before a court"¹⁰⁸ or "solicit or obtain such information"¹⁰⁹ will be punished.

On the other hand, the Law Commission proposed putting in place systems to make it easier for jurors to report their concerns about fellow jurors' misconduct.¹¹⁰ The court needs to facilitate jurors to report to judges if they found their fellows' misconduct and inappropriate action during the jury deliberation more efficiently. However, as Asquith is concerned:

¹⁰⁴ See Section 71(3) of the Criminal Justice and Courts Act 2015. The Section 71(3) clearly provided that "the information" would be about a person involved in events relevant to the case, the judge dealing with the issue, any other person involved in the trial, whether as a lawyer, a witness or otherwise, the law relating to the case, the law of evidence, and the court procedure. *Ibid*

¹⁰⁵ See Section 71(3) of the Criminal Justice and Courts Act 2015

¹⁰⁶ *Ibid*

¹⁰⁷ *Ibid* Section 72

¹⁰⁸ *Ibid* Section 74(1)

¹⁰⁹ *Ibid*

¹¹⁰ See the Law Commission (n 85) 111

*Despite the emphasis placed on reporting jury misconduct, jurors still appear to be reluctant to inform on fellow jury members. Timid jurors may still wait until the case is concluded to report any irregularities, fearful of any repercussion as there is no anonymity protection for a juror that identifies and reports such misconduct. Clearly this would potentially result in an expensive appeal and potential retrial.*¹¹¹

Reflecting this Law Commission's proposal and to facilitate a 'fair' juror to report the other jurors' misconducts, the provision illustrated several exceptions to the Section 74(1). For example, a juror who disclosed the contents of his or her deliberation will not be punished, if the disclosing of the deliberations was "for the purposes of enabling the jury to arrive at their verdict or in connection with the delivery of that verdict."¹¹² In addition, it will also be an exception when a juror disclosed the other jurors' misconducts at their deliberation or the misconduct might be the grounds for an appeal against the defendant's conviction or sentence.¹¹³

Finally, Section 73 of the Criminal Justice and Courts Act 2015 provided the "conduct from which it may reasonably be concluded that the person intends to try the issue otherwise than on the basis of the evidence presented in the

¹¹¹ Glen Asquith, 'Case Comment: *Attorney General v Theodora Dallas*: criminal procedure –contempt of court' (2012) 17(1) Coventry Law Journal 113, 118

¹¹² Section 74(1) of the Criminal Justice and Courts Act 2015

¹¹³ Ibid. The Section restricted the people who could receive the disclosed information from a juror must be a police officer, the trial judge, a judge of the Court of Appeal, the registrar of the criminal appeals, or appropriate court staff.

proceedings on the issue”¹¹⁴ as a “prohibited conduct” by a juror which consists an offence, if the juror engaged in it intentionally during the trial period.¹¹⁵ To convict a juror for this offence, it needs that he or she knew such a conduct was prohibited.

If a juror contravened the Section 71 to 74 of the Criminal Justice and Courts Act 2015, he or she may be sentenced imprisonment for a term maximum two years and/or a fine as used to be by Section 14 of the Contempt of Court Act 1981.¹¹⁶ These offences have been counted as an indictable-only one.¹¹⁷ Moreover, proceedings for those four offences may not be instituted except by or with the consent of the Attorney General.¹¹⁸

Section 69 of the Criminal Justice and Courts Act 2015 provides it will consist a contempt of court if a juror was not follow the order by a judge to surrender an ‘electronic communications device.’¹¹⁹ Although the severe restriction towards a juror’s use of the Internet and social media will be continued, there shall be the appropriate place and time which permits jurors to use their electronic communications devices during their jury service. Jurors may not be able to use their electronic communications devices only at the specific places in the court

¹¹⁴ Section 73 of the Criminal Justice and Courts Act 2015

¹¹⁵ Ibid

¹¹⁶ Ibid Section 71(3), 72, 73 and 74(1)

¹¹⁷ Ibid

¹¹⁸ Ibid

¹¹⁹ Section 69 defines an ‘electronic communications device’ as “a device that is designed or adapted for a use which consists of or includes the sending or receiving of signals that are transmitted by means of an electronic communications network.” This definition is same one as provided in Section 32 of the Communications Act 2003.

building.¹²⁰ Judges are just provided with a statutory power to remove such an Internet enabled devices from jurors whenever it is necessary in the interests of justice.¹²¹ The Law Commission suggests that, “There should not be an automatic prohibition on jurors having the use of internet-enabled devices in the court building.”¹²² Therefore, the Section provided the order for jurors not to use the electronic communications devices may be “made subject to exceptions.”¹²³

There were several proposals by the Law Commission which were not applied to the Criminal Justice and Courts Act 2015. For example, the Law Commission indicated that the reason for the misconduct by a juror may be because of a general lack of knowledge among the English people about the operation of the English criminal justice system.¹²⁴ Therefore, the Commission specifically provided the solution including “greater education in schools about the role and importance of jury service; improving information provided to jurors about their obligations during jury service; changes to the wording of the juror oath to include an agreement to base the verdict only on the evidence heard in court; requiring jurors to sign a written declaration.”¹²⁵ The Law Commission suggested improving the jury instruction sending a DVD to each juror and

¹²⁰ Section 69 of the Criminal Justice and Courts Act 2015 provided that the jurors may have to surrender the use of their electronic communications devices (a) in the building in which the trial is being heard, (b) in other accommodation provided at the judge’s request, (c) visiting a place in accordance with arrangements made by the court, or (d) travelling to or from a place mentioned in (b) or (c).

¹²¹ Ibid

¹²² The Law Commission (n 85) 121

¹²³ See Section 69 of the Criminal Justice and Courts Act 2015

¹²⁴ See the Law Commission (n 48) 91

¹²⁵ The Law Commission (n 85) 6

website.¹²⁶ Obviously, those measures will need further budgeting. These specific proposals were not applied in the provisions in the Criminal Justice and Courts Act 2015 this time.

As another example, the Law Commission suggested creating an exception of Section 8 of the Contempt of Court Act 1981: permission “for authorised academic research into jury deliberations, with a range of rigorous safeguards in place in order to protect the integrity of the jury’s decision and the anonymity of jurors and parties to the trials.”¹²⁷ For instance, empirical studies on contempt of court committed by jurors have had limitations because these researches have often relied on self-reporting by jurors on their behaviour.¹²⁸ The suggestion of the Law Commission might solve the problem of credibility and quality of contemporary empirical research on English jury. However, there are no provisions in the Criminal Justice and Courts Act 2015 to apply this suggestion about an authorised academic research into jury deliberations.

5.) Conclusion for the chapter

Although the Criminal Justice and Courts Act 2015 repealed Section 8 of the Contempt of Court Act 1981, the severe restriction towards a juror’s private research and the disclosure of the secrecy of jury deliberation has been

¹²⁶ See the Law Commission (n 85) 111

¹²⁷ Ibid 6. This seems to be similar relaxation to the Section 68(A)(3) of the Jury Act 1977 (New South Wales) above.

¹²⁸ See the Law Commission (n 48) 73

continued. According to the Government, if there is no such a severe restrictions:

Public confidence in the jury system could be damaged.

The finality of the verdict would be put at risk.

Jurors might be less frank if they knew the details of their discussions might be made known to someone else outside the jury room.

The clause as drafted would not prohibit counsel for the defendant or the prosecution approaching jurors after the case to discuss it, including the performance of witnesses.

Jurors could be pressured to allege improprieties without foundation not all research would be bona fide.

*Jurors would feel under pressure to talk to researchers.*¹²⁹

The Government's firm and severe attitude has been a continual subject of criticism of people including academics, who insist on relaxation of the severe restriction. However, according to Thomas, the idea that Section 8 of the Contempt of Court Act 1981 had made academic research with actual jurors impossible is a "well-entrenched and unfounded myth."¹³⁰ Thomas is against the repeal of Section 8 of the Contempt of Court Act because "in the last decade, research conducted within the boundaries of Section 8 and with actual jurors at court in England and Wales has been able to examine all of the following

¹²⁹ Department for Constitutional Affairs, *Jury Research and Impropriety* (1st edition, Consultation Paper CP04/05, 2005) 15

¹³⁰ Thomas (n 85) 501-502

fundamental aspects of the jury system.”¹³¹ Therefore, “Contrary to popular myth, the existing provisions of Section 8 of the Contempt of Court Act present no barrier to conducting rigorous and reliable empirical research with actual juries in this country. There is no reason why reform of the law of contempt in relation to juries should not be based on such evidence.”¹³² Although her empirical research has been popularly known, these descriptions are reflected Thomas’s overconfidence of the methodology and results of her empirical research. Hence, this theory will be subject to criticism as a conceit without any strong evidence.

The Law Commission has pointed out that, “Whilst the law of contempt by publication is intended to prevent any legal tribunal from becoming partial, the focus of the law has increasingly been on preventing bias amongst the jury.”¹³³ In other words, contempt of court committed by other legal decision-makers in England, including magistrates and judges, has not been focused on so much because they do not have so many difficult problems as jury contempt. If so, to put the period on the unending and controversial discussion of the severe restriction towards a juror’s private research and the disclosure of the secrecy of jury deliberation problem, why do the Government and academic researchers not seek to increase the use of other forms of tribunals instead of the jury trial? To resolve the complex aspects of a jury, and modernise the English Criminal Justice system, the final part of this thesis will discuss the possible alternative

¹³¹ Thomas (n 85) 502

¹³² Ibid 503

¹³³ The Law Commission (n 85) 9

model of twenty-first century English Criminal Justice system without the use of a jury trial.

Part 3: Conclusion and Recommendations

Roberts and Hough state that “If the public strongly support the jury, they are likely to oppose any proposals to restrict the option of trial by jury.”¹ Is it actually correct? Through my research about the defects of the English jury system, it has been clear that the quality of a jury as a judicial decision-making body lessened and the right to a fair trial is under significant pressure. The court and the Government have taken various measures to solve the problems. As Cram has pointed out, “A central theme of recent reforms in English criminal justice has been the desire to achieve a more efficient system of criminal justice.”² In the flow of this reform, they have aimed to modernise the English jury system; however, there are so many complex processes to achieve fair jury trials. Freer states that “Consideration of alternatives usually concludes there is nothing better. Many of the problems outlined above cannot be easily ameliorated.”³ Unlike her theory, this concluding part of the thesis will deliberate what sort of alternative criminal justice system could be realistically possible instead of jury trial. The magistrates’ courts model, judge-only trial and the other systems like continental lay-judge system will be examined before the conclusions for this thesis.

¹ Julian Roberts and Mike Hough, *Public opinion and the jury: an international literature review* (1st edition, Ministry of Justice Research Series 1/09, 2009) 20

² Ian Cram, ‘Automatic reporting restrictions in criminal proceedings and Article 10 of the ECHR’ (1998) 6 *European Human Rights Law Review* 742, 742

³ Elaine Freer, ‘From Chicago to Malta: possible explanations for avoiding jury service’ (2012) 6 *Archbold Review* 6, 7

1. The contemporary role of a judge in a jury trial

Before discussing the alternative models of the English criminal trial, the contemporary role of a trial judge in a criminal court will be deliberated. The role of a trial judge is limited to 'the finder of law.' A judge may not need to address any fact finding process by a jury. As Darbyshire states that "It has often been said that the essence of the role of the English judge, or magistrate, is as an unbiased umpire whose job it is to listen to evidence presented by both sides, without interfering in the trial process."⁴

As Artigliere suggests that, "Justice in a jury trial relies on effective communication."⁵ Ministry of Justice states that it is important for a judge to provide jurors necessary information and explanation which is easy to understand and make reassured them on the case and the jury service.⁶ Especially, a judge's instruction and summing up before a jury deliberation has significant elements which influence a jury verdict. The Judge will sum up the case and instruct jurors in legal information and matters on the case. Sargent stated that a trial judge "can freely indicate their own views on the evidence provided they have told the jury that they are the judges of fact and qualify their adverse comments and deductions with 'but it is a matter for you members of

⁴ Penny Darbyshire, *Darbyshire on the English Legal System* (10th edition, Sweet & Maxwell, 2011) 205

⁵ Ralph Artigliere, 'Sequestration for the twenty-first century: disconnecting jurors from the Internet during trial' (2011) 59 *Drake Law Review* 621, 625

⁶ See Ministry of Justice, *Crown Court Survey of Jurors: Ministry of Justice Statistics Bulletin* (1st edition, 2010) 4

the jury.”⁷ Therefore, as Young has pointed out that, the number of perverse jury verdicts would be likely to be reduced if judges can efficiently instruct juries to decide cases in accordance with the law and the facts.⁸

A juror may be able to send notes to put their questions on the case to the judge.⁹ To solve the complicated contemporary problems that have been raised from juror’s Internet-use, Cram suggests that, facilitating jurors to ask a judge questions as much as they want.¹⁰ Moreover, it seems to be better for a trial judge to give jurors a written summary of the legal directions with their oral instructions to improve juror comprehension of the law.¹¹ Artigliere suggests that, a judge sometimes should use visual aids in his or her jury instruction to deepen the juror’s understanding on the case.¹²

It is not too much to say that a judge’s instruction will decide whether a jury verdict could be smoothly given and achieve a fair judgment. Nietzel et al. suggested that, “The courts routinely rely on judicial instructions to be the cure for all sorts of potential evidentiary problems and /or the guide that leads jurors

⁷ Tom Sargent and Peter Hill, *Criminal Trials: The Search for Truth* (1st edition, Fabian Society, 1986) 12

⁸ See William Young, ‘Summing up to juries in criminal cases – What jury research says about current rules and practice’ (2003) *Criminal Law Review* 665, 669

⁹ See Ministry of Justice, ‘Your Role as a Juror’ (2012)
<<http://www.youtube.com/watch?v=JP7slp-X9Pc&feature=relmfu>>
accessed 8 March 2015

¹⁰ See Ian Cram, ‘Twitt(er)ing open justice?’ in Judith Townend (ed), *Justice wide open: working papers* (1st edition, Centre for Law, Justice and Journalism, 2012) 99

¹¹ Thomas shows that 48 per cent of jurors could correctly understand legal questions when they were given both oral directions and a written summary. When jurors were given only oral directions without any written summaries, the rate was 31 per cent. See Cheryl Thomas, *Are Juries Fair?* (1st edition, Ministry of Justice Research Series 1/10, 2010) 38

¹² See Artigliere (n 5) 635

through a thicket of confusing or ambiguous legal standards.”¹³ In other words, the capability of a judge is a significant factor for assuring a fair trial. Australian regulations on juror misconduct tells us the judge’s capability and instruction is really significant to achieve a fair trial not only in England but in the other Commonwealth countries. Could a trial judge always have enough quality to instruct a jury appropriately? In this point, Ruva et al. were suspicious. They indicated that, “Until researchers can provide the courts with strong evidence of the mechanisms underlying the pre-trial publicity bias, the courts will continue to rely on questionably effective remedies such as judicial instructions to ignore pre-trial publicity.”¹⁴ Nietzel et al. concluded “Research on judicial instructions indicates that when instructions are not psychologically well crafted, they are minimally effective. When admonitions or directives from a judge are worded and delivered in ways designed to increase their effects, jurors are, to some degree, better informed, guided, and even constrained by these instructions.”¹⁵

Devine suggests “Jurors don’t understand their instructions as well as they think they do, as well as judges would like to think they do, or as well as we in society might hope they do.”¹⁶ However, according to *Crown Court Study*, less than ten

¹³ Michael Nietzel, Dennis McCarthy and Monica Kern, ‘Juries’ in Ronald Roesch, Stephen Hart and James Ogloff (ed), *Psychology and Law* (Paperback edition, Kluwer Academic/Plenum Publishers, 1999) 34

¹⁴ Christine Ruva, Cathy McEvoy and Judith Bryant, ‘Effects of Pre-Trial Publicity and Jury Deliberation on Juror Bias and Source Memory Errors’ (2006) 21 *Applied Cognitive Psychology* 45, 61

¹⁵ Nietzel et al. (n 13) 44

¹⁶ Dennis Devine, *Jury Decision Making—The State Of The Science* (1st edition, New York University Press, 2012) 56. Devine is sceptical of the positive statistics and suggests “Overall, it is clear that many jurors do not understand their instructions at an adequate level – although they seem to think they do. Even worse, those who understand the instructions least well tend to be most severe in their decisions (both guilt and sentencing.)” Ibid 59

per cent of jurors said they had difficulties in following the judge's summing up on the law.¹⁷ Moreover, the statistics showed nearly 99 per cent of jurors thought the judge did their job well.¹⁸ To reply to the question of whether a judge's summing up pointed toward acquittal or conviction, two-thirds of jurors answered that the judge did not favour either side.¹⁹ Coincidentally, 16 per cent of jurors thought the judge summed up for an acquittal, and another 16 per cent of them said the judge summed up for a conviction.²⁰ Therefore, it seems to be that a trial judge's instruction has gone well and has worked efficiently for a jury to decide its verdict.

Thomas asserts her empirical research found that jurors require more guidance about various aspects of jury deliberations.²¹ According to her, 82 per cent of jurors prefer more guidance on conducting deliberations. Specifically, 49 per cent of them have concerns about what to do if confused about legal issues, 45 per cent are worried how to ensure no one is pressured into a verdict, and 35 per

¹⁷ See the Royal Commission on Criminal Justice, *Crown Court Study* (1993) HMSO Research Study No.19, 216. Nonetheless, there has been no research which examines jurors' actual comprehension of judge's instructions. See Thomas (n 11) 3. In New South Wales, Australia, there is a statistics in 2007-2008 which shows that the 85.3 per cent of jurors answered they understood either everything (57.5 per cent) or nearly everything (27.9 per cent) of the judges' summing up of the trial evidence. See Lilly Trimboli, 'Juror understanding of judicial instructions in criminal trials' *Crime and Justice Bulletin* (September 2008) NSW Bureau of Crime and Statistics Research No. 119 <<http://www.bocsar.nsw.gov.au/agdbasev7wr/bocsar/documents/pdf/cjb119.pdf>> accessed 8 March 2015, 6. Moreover, the 94.9 per cent of jurors responded they either understood completely (47.2 per cent) or understood most things the judges' instructions on the law (47.7 per cent). Ibid 9

¹⁸ See The Royal Commission on Criminal Justice (n 17) 221

¹⁹ Ibid 217

²⁰ Ibid

²¹ See Cheryl Thomas, 'Avoiding the perfect storm of juror contempt' (2013) 6 Criminal Law Review 483, 496

cent do not know what to do if something goes wrong.²² Therefore, Thomas suggests that, “providing juries with general deliberation guidance could help to reduce the time juries take to deliberate, which would have efficiency and cost benefits.”²³ This shows that an efficient judge’s instruction will reduce the cost in both money and time of a jury trial.

It is predicted that the role of a judge in England will be more significant since the globalised society and developed technologies including the Internet and social media have made a criminal trial more complicated: for instance, a serious and complex fraud trial and perverse verdicts by jury misconduct which constitute contempt of court.²⁴

Especially in a high profile case, there is a high possibility for a jury to unconsciously rely on impartial and incredible information from the media without a judge’s appropriate instruction. For instance, jurors in the criminal trial of William Roache, The trial judge, Justice Holroyde “told jurors not to rely on any assumptions they may have made about similar cases.”²⁵

There is no guarantee that a judge will not do any misconduct. One of the possible solutions for avoiding a judge’s misconduct in a trial would be facilitating open justice in criminal proceedings to assure public confidence. It

²² See Thomas (n 21) 497

²³ Ibid

²⁴ Runciman Committee predicted the similar future suggesting the role of the judge will be “particularly important in long and complex fraud trials.” See Royal Commission of Criminal Justice, *Royal Commission Report on the Criminal Justice System* (Cmd 2263, 1993) 136. See so-called *Runciman Report*.

²⁵ *The Times* (London, 4 February 2014)

includes broadcasting by a video camera in a court room. As Cram stated that in a criminal trial, “open proceedings have a disciplinary function in that they ensure the proper functioning of the participants.”²⁶ Cram predicted that judges’ improper action could be avoided if the outside people can monitor their conduct.²⁷ Of course, as he stated that it needs to be compatible with the necessary media coverage of a trial by the Contempt of Court Act 1981.²⁸

2. The alternative criminal justice system instead of trial by jury

1.) The lay element in the criminal justice system

The jury system has long been regarded as one of the significant pillars of the English common law system and a highly supported trial-model according to Thomas.²⁹ Thompson stated that “No one would even dream of inventing such an institution [jury] today.”³⁰ Steyn indicated that, “The jury system is an integral and indispensable part of our constitutional arrangements.”³¹ Indeed, it could be expressed as the longest judicial system in English legal history. Some people suggested that, why the jury system remained for such a long time is because of its lay element. For some people, the jury is a symbol of judicial democracy, which is a crucial tool that can be against the Government. For example, Vidmar stated that a jury is “a powerful democratic element in the

²⁶ Cram (n 2) 743

²⁷ Ibid

²⁸ Ibid

²⁹ See Cheryl Thomas, *Diversity and Fairness in the Jury System* (1st edition, Ministry of Justice, 2007) 3

³⁰ E.P. Thompson, ‘Subduing the Jury’ (1986) 8(21) *London Review of Books* 7, 8

³¹ Johan Steyn, ‘The role of the Bar, the judge and the jury: winds of change’ (1999) *Public Law* 51, 58

process of delivering justice”³² by ordinary citizens with their common sense. Jury nullification previously reflected this function. However, it is difficult for ordinary English people to fight against the Government by the use of a jury service opportunity in this twenty-first century. If so, what is the reason for keeping the lay element in a criminal trial? Why has the Government not facilitated trial by a professional to save money and improve the time efficiency in a trial?

Looking at American jury, Dzur suggests that, ‘democratic professionalism’ which urges citizens to share the role of legal experts and to engage in criminal procedures more actively. In *Punishment, Participatory, Democracy & the Jury*,³³ he argues for expanding the role of the jury in American criminal courts and promoting further use of jury trials in the country. Dzur describes the jury as an institution of self-governance. In addition, the original purpose of the use of the jury system in the United States was for “check and monitoring”³⁴ of the judicial power by the lay-citizen.

³² Neil Vidmar (ed), *World Jury systems*, Oxford University Press, reprinted edition, 2003, General Editor’s Introduction

³³ Albert Dzur, *Punishment, Participatory, Democracy & the Jury* (1st edition, Oxford University Press, 2012)

³⁴ Ibid 13

2.) The magistrates' court model

As in the US, the lay element of the judicial making body has significant virtue yet in England. Grieve suggests the reason for supporting the criminal jury system even now as below:

*Many people will go through life without any direct involvement in the criminal justice system. Their information will be gleaned from the media, drama, possibly anecdotes from friends or family. Depending on their generation, it may be Rumpole of the Bailey, This Life, or Silks. It seems to me that one way for the system to maintain legitimacy is for people to have a way of genuinely being part of the decision making process. Indeed, it is hard to think of a more serious or important civil duty that virtually any member of the public may be called upon to conduct.*³⁵

However, jury trial is not the only criminal justice system which has these virtues. If the lay element of a jury had a significant reason to support its legitimacy, a lay magistrate would be an appropriate alternative. Magistrates have two categories: a lay magistrate (the Justice of the peace) and a District judge (professional.) Professionals deal with, for example, serious and complex fraud cases efficiently.

³⁵ Dominic Grieve, 'Speech on the jury system and the challenges it faces, given as part of Politeia's justice series' (2013)
<<https://www.gov.uk/government/speeches/in-defence-of-the-jury-trial>>
accessed 8 March 2015, 3

It seems that a trial by District judge, a professional, only is not always an ideal solution for achieving a fair trial. Sargant argued that, a trial judge in the Crown Court should not be selected from barristers because their long practice at the Bar may not suit the preparation for judicial office.³⁶ For Sargant, barristers who are the people who “trained to argue that black is white.”³⁷ Provided Sargant’s descriptions were correct, a criminal trial by lay magistrate would be an ideal alternative rather than a trial by a district judge, an originally professional legal practitioner or a trial by a trial judge in the Crown Court. Lay magistrates will consult justice’s clerks who have legal knowledge and give lay magistrates legal advice on their decision-making process.³⁸ Darbyshire stated that the magistrates usually relied too much on the justice’s clerks.³⁹ She suggested “Clerks should be given no more judicial powers than are absolutely necessary, unless and until they are to be recognised as judges.”⁴⁰ To keep as much of the lay element of the Justices of peace as possible, creating a clear standard in relation to the function and roles of justice’s clerks is significant.

As the statistics showed obviously in the previous chapters, jury trial is more time-consuming than trial by magistrates. Especially, in the case of a perverse

³⁶ See Sargant and Hill (n 7) 13

³⁷ Ibid

³⁸ See Judiciary of England of Wales, ‘2012 Judicial Diversity statistics - Gender, Ethnicity, Profession and Age’ (2012) <http://www.judiciary.gov.uk/wp-content/uploads/2014/05/tribunal-diversity-breakdown-sept12.xls> accessed 8 March 2015

³⁹ See Penny Darbyshire, ‘A comment on the powers of magistrates’ clerks’ (1999) *Criminal Law Review* 377, 380. Darbyshire has been concerned the tendency for the lay magistrates to agree with the judicial expert, “a process termed obedience.” See Penny Darbyshire, Andy Maughan and Angus Stewart, *What can the English legal system learn from jury research published up to 2001?: Research Papers in Law* (1st edition, Kingston University, 2002) 39

⁴⁰ Darbyshire (n 39) 379

verdict by a jury, as Lord Judge in *R v Dallas* has pointed out, “The time of the other members of the jury was wasted, and the public was put to additional unnecessary expense.”⁴¹ Lord Falconer suggests “Re-engineering the criminal justice system to deliver a process that is much simpler, speedier and in which summary justice plays a more significant part; simply, speedy, summary.”⁴² The speedy trial by lay magistrates could be one of the main reasons for the alternative.

There are several critics against the lay-magistrates’ court type tribunal.

Lloyd-Bostock states that:

*Experienced magistrates, in contrast with jurors, have frequently taken the same kind of decision before, making them routine as well as expert decision-makers. They have ‘seen’ most cases before, in the sense that a range of typical cases is repeated. The more experienced they are the more likely it is that they use schemata, prototypes or categories to make decisions quickly and routinely.*⁴³

Nonetheless, she has never mentioned evidence of her theory. Baroness Helena Kennedy asserted that, “Changing the powers of magistrates might be a way by stealth of reducing the number of jury trials.”⁴⁴ Conversely, Sprack suggests

⁴¹ *Attorney General v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991 at [38]

⁴² Charles Falconer, *Doing Law Differently* (1st edition, Department for Constitutional Affairs, 2006) 4

⁴³ Sally Lloyd-Bostock, ‘The effects on lay magistrates of hearing that the defendant is of “good character,” being left to speculate, or hearing that he has a previous conviction’ (2006) *Criminal Law Review* 189, 192

⁴⁴ Louis Blom-Cooper, ‘Jury trials ‘facing fresh threat’ *BBC NEWS* (London, 16 April 2002)

that, “Supporters of the lay magistracy rely upon the wide experience of life which they bring to the bench, and the greater chance that a decision reached by several people will be more considered, and consequently fairer, because of the interaction between the members of the bench.”⁴⁵ Slapper states that the magistrates experience will develop strong public confidence in the English criminal justice system.⁴⁶ He continues that, rendering such an important role with the right to order conviction and acquittal to the large members of the public could be socially beneficial.⁴⁷

According to the 2002 Bar Council survey, 73 per cent of sampled English people thought a jury would be more likely to be influenced by their own views and values rather than a judge and two magistrates, while 24 per cent felt they would be less influenced by their own views.⁴⁸ Therefore, Roberts and Hough state that for most of the English people, juries are more representative of the community than are judges.⁴⁹ However, according to the same statistics, the public confidence in an English jury was 80 per cent, and in an English magistrate it was 71 per cent.⁵⁰ Hence, it could be said that there is not so much differences in the public confidence between a jury and a magistrate.

⁴⁵ John Sprack, *A Practical Approach to Criminal Procedure* (14th edition, Oxford University Press, 2012) 94-95

⁴⁶ See Gary Slapper, *How the Law Works* (3rd edition, Routledge, 2014) 53

⁴⁷ Ibid

⁴⁸ See Bar Council, *The Views on Trial By Jury: The British Public Takes a Stand* (1st edition, The Bar Council, 2002); Roberts and Hough (n 1) 26

⁴⁹ See Roberts and Hough (n 1) 26

⁵⁰ Significantly, the public confidence in an English judge was 71 per cent as same as magistrates’. Moreover, the public confidence in an English police was 81 per cent which was quite similar to the one in an English jury. See Bar Council; Roberts and Hough (n 48) 15

Section 46 to 50 of the Criminal Justice and Courts Act 2015 “would implement the Government’s strategy to remove certain high-volume, non-imprisonable summary-only offences from magistrates courts.”⁵¹ The Ministry of Justice suggests, “Magistrates courts are clogged up by these types of cases, which arrive in large volumes, are usually uncontested and have predictable financial penalties.”⁵² The Section 48(3) of the Criminal Justice and Courts Act 2015 permitted a single magistrate to try and sentence adult defendants in such cases and will abolish the requirement to hear them in an open court.⁵³ If the defendant pleads guilty or requests an open court hearing, these changes will not be applied.⁵⁴ These reform plans are influenced by the Government’s attitude towards the magistrates’ courts: it has respected the role and efficiency of trials by magistrates and predicted the further expanded use of magistrates’ courts.

In England, the randomness of a jury selection tends to be respected. As Thompson has pointed out, the random jury selection is an essential element of fair trial.⁵⁵ The peremptory challenge has been abolished to expand opportunities of jury service for as many English citizens as possible. However, according to Thompson, in the US, a juror must be a good and true man with a

⁵¹ House of Lords, ‘Library Note: Criminal Justice and Courts Bill’ (2014) LLN 2014/022, 16

⁵² Ministry of Justice, ‘Fact Sheet: Removing High Volume, Low Level ‘Regulatory Cases’ from Traditional Magistrates’ Courtrooms (Clauses 24–28): Trial by Single Justice on the Papers’ (2014)
 <<http://www.publications.parliament.uk/pa/cm201314/cmpublic/criminaljustice/140325/am/140325s01.htm>> accessed 8 March 2015, 1

⁵³ See also House of Lords (n 51)

⁵⁴ See Section 48(3) of the Criminal Justice and Courts Act 2015

⁵⁵ See Thompson (n 30) 13

clear reputation.⁵⁶ Therefore, the US preserves the peremptory challenge and respects the *voir dire* procedure more than in England. The English theory that enlarging the diversity of jurors contributes to assure fairness of a trial is understandable because it supplies an opportunity for a defendant to be heard by wide range of peers. On the other hand, as Spencer has pointed out that, “If juries are composed of twelve people chosen from the electoral role at random, it is inevitable that they will sometimes be dominated by people who are racists, or are irresponsible and silly, and our legal system is gravely deficient if it fails to guard against this obvious danger.”⁵⁷ If the Government seeks to improve the quality of a jury as a judicial decision-making body, it will need to establish a criminal trial by true and ‘good and’ true men like in the US without reviving the peremptory challenge. The trial by lay magistrates could be a reasonable solution for achieving this aim.

3.) Judge-only trial

Section 43 and 44 of the Criminal Justice Act 2003 aims to introduce the idea of non-jury criminal trial in case of a serious and complex fraud and jury tampering. Only the judge-only trials on jury tampering have been realised at the moment. The advantages and disadvantages of non-jury criminal trial have a difficult controversy. If the jury system is one of the significant and traditional pillars of the common law system, the complete abolition of the trial by lay people in

⁵⁶ See Thompson (n 30) 13

⁵⁷ John Spencer, ‘Did the Jury misbehave? Don’t ask, because we do not want to know’ (2002) 61(2) Cambridge Law Journal 291, 293

England, and introducing trial by a professional will not avoid the substantial criticisms and long discussion. For instance, Blake asserted that, “It is impossible to take away the centerpiece of the [jury] system and replace it by, for instance, a judge sitting alone without doing damage to the whole system.”⁵⁸ On the other hand, there is a theory which suggests the necessity for the judge-only trial for achieving a fair trial. For example, Johnston et al. state that “Increasing the use of judge-alone trials would overcome the risk of juror bias resulting from exposure to material on social media (either prior to or during a trial) and would also offer a solution to the problem of jurors using social media to disseminate information relevant to the trial.”⁵⁹

Justice for All, the White Paper of the Blair New Labour Government in 2002, suggested that, “Juries make an invaluable contribution to the Criminal Justice System,”⁶⁰ and “We believe that trial by jury should be used for the most appropriate cases, and that juries should be better supported in practical ways.”⁶¹ In other words, it was practical to keep and maximise the positive points of the jury system, thus that New Labour Government took the policy which limits trial by jury only in specific cases.

The jury reform has been continued by the current coalition Government with the enactment of the Criminal Justice and Courts Act 2015. Prior to the

⁵⁸ Nicholas Blake, ‘The Case for the Jury’ in Mark Findlay and Peter Duff (ed), *The Jury Under Attack* (1st edition, Butterworths, 1988) 140

⁵⁹ Jane Johnston, Patrick Keyzer, Geoffrey Holland, Mark Pearson, Sharon Rodrick, and Ann Wallace, *Juries and Social Media: a report prepared for the Victorian Department of Justice* (1st edition, The Standing Council on Law and Justice, 2013) 16

⁶⁰ Home Office, *Justice for All* (Cmd 5563, 2002) 122

⁶¹ Ibid

enactment of it, the Law Commission predicts, “An alternative to trial with a jury would be to adopt a trial process incorporating the protections provided for by trial on indictment (for example, in respect of investigations, evidence, bail, disclosure and so on) but presided over by judge alone,”⁶² when the risk of a contempt of court committed by jurors would be expected.

It is certain that the contemporary criminal jury system will be further reformed and the amount of jury trials will not stop decreasing. To reduce the budget for justice on the course of fiscal restraint of the current coalition Government, Lord Chief Justice Thomas of Cwmgiedd asserts that abolition of the right to trial by jury for numerous less serious indictable offences and complex frauds must be heard at as the part of radically reformed new criminal justice system.⁶³

Involving lay people to the judicial making process at every possible chance requires large amounts of money, time, burden and energy.⁶⁴ However, the high support rate of the jury, which was showed by Thomas, could be the evidence that a large percentage of the English citizens found virtues in the lay element in a criminal trial.⁶⁵ Therefore, it is difficult to believe that complete

⁶² The Law Commission, ‘Contempt of Court: A Consultation Paper’ (2012) Consultation Paper No. 209, 25

⁶³ For instance, Lord Thomas noted that, “fights where injuries are not overly severe and dishonesty where the monetary value is small.” See Frances Gibb and Sean O’Neill, ‘Lord Chief Justice condemns creeping secrecy in trials’ *The Times* (London, 5 March 2014) <<http://www.thetimes.co.uk/tto/law/article4266214.ece>> accessed 8 March 2015

⁶⁴ According to the empirical research by Young, et al., in New Zealand, 57 per cent of criminal jurors argued that they felt inconvenience in their life as a result of their jury service. See Warren Young, Neil Cameron and Yvette Tinsley, *Juries in Criminal Trials Part Two* (1999) New Zealand Law Commission Preliminary Paper No.37(2) <http://www.lawcom.govt.nz/sites/default/files/publications/1999/11/Publication_76_159_PP37Vol2.pdf> accessed 8 March 2015, 79

⁶⁵ See Thomas (n 29)

implementation of judge-only trials for all indictable-only offences and abolition of the lay judge system in England will occur.

4.) Adversarial criminal jury and Inquisitorial criminal justice system

a.) The comparison between two different criminal justice system

The adversarial system is one of the basic characteristics of the common law system. Under the adversarial system, the two parties at a trial prepare their own devices and evidences and present them at their cases without any help by the court.⁶⁶ Conversely, the European continental legal system applies an inquisitorial system which involves court officials in the fact finding procedure. Court in continental countries assumes a much greater role in collecting evidence and is involved at an earlier stage in the criminal procedure. However, this categorisation is a sort of stereotype recently.⁶⁷

As Darbyshire states that “The English legal system is unique, in worldwide terms, in making such extensive use of laypeople as decision-makers, as magistrates, jurors and tribunal members.”⁶⁸ The English criminal justice system has respected the lay element in a decision-making body, and minimised the interference by the judges and court officials as much as possible to assure fairness, liberty and justice. There seems to be no space to add continental inquisitorial elements to their adversarial criminal trial procedure since the

⁶⁶ See Darbyshire (n 4) 12

⁶⁷ Ibid

⁶⁸ Ibid 501

English criminal justice system has functioned so well. However, to “make our existing system more capable of serving the interests of both justice and efficiency,”⁶⁹ The Runciman Commission in 1993 aimed “a theoretical assessment of the relative merits of two legal traditions:”⁷⁰ the adversarial and inquisitorial system. These movements after the Runciman Commission including introducing non-jury criminal trials and raising of the magistracy prompts the question: Will the new justice system alter the traditional adversarial system in England towards the inquisitorial system? The answer is clearly ‘NO.’

The contemporary jury reform by the Government aimed to restrict jury trials in certain types of cases, modernise the English criminal justice system to be more efficient in the age of the Internet and the social media, and dissolve significant pressure towards fairness and efficiency of the English jury trial. The *Runciman Report* suggested, “We do not recommend the adoption of a thoroughgoing inquisitorial system.”⁷¹ There is a voice which insists the introducing of the continental inquisitorial system in the high position of the English judiciary. For example, Lord Chief Justice Thomas of Cwmgiedd asserts an inquisitorial system will “secure a fair trial for all whilst doing so within limited and reducing resources. The essence of the change would be a much greater degree of inquiry by the judge into the evidence being brought forward.”⁷² However, the Governmental policy has not shared this radical view.

⁶⁹ *Runciman Report* (n 24) 3

⁷⁰ Ibid

⁷¹ Ibid

⁷² Frances Gibb and Sean O’Neill (n 63)

If the categorisation of the two different criminal justice systems, adversarial and inquisitorial is not absolute and just relative, is it still impossible for the English judiciary to propose a new criminal justice system which has some inquisitorial positive elements? As Csere states that “The distinction between inquisitorial and adversarial systems is also rather ambiguous, as no country's criminal justice system can be considered purely one or the other. Rather, most countries are ‘mixed or hybrid systems’ located somewhere on the spectrum between the inquisitorial and adversarial poles.”⁷³

b.) Mixed jury system in continental countries

Looking at the current continental criminal justice systems in Germany, France, Italy and so on, the most serious criminal cases are heard by professional judges with lay jurors.⁷⁴ This is called as a ‘mixed jury.’⁷⁵ It seems to be similar to the English magistrates court system, however in this model of the court, the judge would monitor jurors’ misconducts and avoid perverse verdicts in a jury deliberation room. The judge could also provide procedural guidance and legal advice to jurors to reach the verdict.⁷⁶ Bard and Horan are concerned about the possibility of a judge who inappropriately influences the jury verdict through

⁷³ Michael Csere, ‘Reasoned Criminal Verdicts in the Netherlands and Spain: Implications for Juries in the United States’ (2013) 12(2) Connecticut Public International Law Journal 415, 417

⁷⁴ Juror in the continental countries is also called a lay judge or a lay assessor. See Roberts and Hough (n 1) 42; Stephen Thaman, ‘Europe’s new jury systems: the cases of Spain and Russia’ (1999) 62(2) Law and Contemporary Problems 233, 237

⁷⁵ See Johnston et al. (n 59) 21

⁷⁶ Ibid

their conduct.⁷⁷ The continental mixed jury trials could be under a strong control and leadership by a judge in a jury deliberation. This is one of the characteristics of the inquisitorial criminal justice system. In other words, it is not a judgment by lay people only, although the lay people have been labeled as a 'jury.' It is clearly different both from the adversarial jury system and the magistrates court system in England. Thus, the continental mixed jury system will not well-function in England, which is applying an adversarial criminal justice system if the continental mixed jury system was directly introduced and used without any change of the system.

c.) Spanish experience: adversarial elements in an inquisitorial criminal justice system

There is a continental inquisitorial criminal justice system which has a number of adversarial elements in Spain: it is the trial by lay jurors. Thaman provided that, "The Spanish criminal trial was perhaps the most adversarial on the European Continent even before the passage of the jury law. Although the Spanish jury law kept the trial procedure basically unchanged, the trial judge's ability to control the collection of evidence has been drastically impeded by the lack of access to the investigative dossier."⁷⁸ For instance, he continued that, "The trial begins not only with the reading of the prosecution's accusatory pleadings, but also with the pleadings of the defendant and the private

⁷⁷ See Roxanne Burd and Jacqueline Horan, 'Protecting the right to a fair trial – has trial by jury been caught in the world wide web?' (2012) 36 Criminal Law Journal 103, 119-120

⁷⁸ Thaman (n 74) 243

prosecutor, usually representing the alleged victim, the victim's family, or their representatives.”⁷⁹ In addition, in Spain, any sort of evidence must be presented “at the oral hearing (*juicio oral*).”⁸⁰

The Code of Criminal Procedure of 1872 and the Law on the Jury of 1888 provided the basis for the Spanish jury trial. The jury system had functioned between 1888 and 1923, when it was suspended by the Primo de Rivera dictatorship.⁸¹ It was revived between 1931 and 1936. The Article 125 of Post-Franco Spanish Constitution 1978 provided the right to take part in the administration of justice through trial by jury.⁸² In addition, the Organic Law on the Jury Court (*Ley Organica del Tribunal del Jurado*) 1995 regulated further specific jury guidelines and procedural rules.⁸³ Article 1 of the Organic Law on the Jury Court (*Ley Organica del Tribunal del Jurado*) 1995 restricted jury trial to particular types of crimes, including “crimes committed by public officials in the exercise of their duties, crimes against persons, honor, liberty, and security, and arson.”⁸⁴

A Spanish jury is composed of nine jurors.⁸⁵ The role of a judge in Spain has been much more limited than in other continental countries. According to

⁷⁹ Thaman (n 74) 243

⁸⁰ Mar Jimeno-Bulnes, ‘Jury selection and jury trial in Spain: between theory and practice’ (2011) 86(2) Chicago-Kent Law Review 585, 597

⁸¹ See Thaman (n 74)

⁸² This provision was conceived as the key to democratic reform of the criminal justice system following the Franco dictatorship. Ibid

⁸³ See Csere (n 73) 422

⁸⁴ Thaman (n 74) 238

⁸⁵ See Article 2 of the Organic Law on the Jury Court (*Ley Organica del Tribunal del Jurado*) 1995

Thaman, the trial judge does not organise the preliminary hearing and the evidentiary file is not present at the trial.⁸⁶ A trial judge is not allowed to participate in a jury deliberation.⁸⁷

Although the Spanish criminal justice system introduced an adversarial jury system, it is not exactly similar to common law system. For example, the Spanish jury verdict is not the same style as a general verdict of 'guilty' or 'not guilty' is in an Anglo-American criminal trial.⁸⁸ Historically, the Spanish jury verdict has followed the French model, and a jury must fulfil the list of questions or propositions (*objeto del veredicto*) at the final stage of jury deliberation.⁸⁹ Finally, jurors must decide whether they will affirm or deny the proof of the defendant's guilt as to the 'criminal acts' (*hechos delictivos*) including the parties' pleadings.⁹⁰

Moreover, Spanish jurors must give the reason for the verdict at the judgment.⁹¹

In this stage, it is possible for jurors to call for the support by a secretary of the court who is a law-degree holder to formulate their reasons for the verdict.⁹²

Although there may be possible criticism on such a professional's intervening in

⁸⁶ See Thaman (n 74) 247

⁸⁷ See Article 55-56 of the Organic Law on the Jury Court (*Ley Organica del Tribunal del Jurado*) 1995

⁸⁸ See Thaman (n 74) 249

⁸⁹ The propositions are restricted to the facts presented by the various parties during the trial and relate to the elements of the crimes charged, conditions which modify or exclude guilt, and statutory factors that aggravate or mitigate the defendant's criminal responsibility. Ibid

⁹⁰ Ibid

⁹¹ See Article 120(3) of the Spanish Constitution 1978 and Article 61(1)(d) of the Organic Law on the Jury Court (*Ley Organica del Tribunal del Jurado*) 1995.

⁹² See Article 49 and 61(2) of the Organic Law on the Jury Court (*Ley Organica del Tribunal del Jurado*) 1995

a jury tribunal, as Csere states that “If the verdict is already decided before assistance is required for the formulation of the reasons, it is difficult to see how the court clerk could affect the actual verdict.”⁹³

The Spanish judge will discharge jurors if they failed to correct defects in their verdicts three times, and retry the case before a new jury. If it is still impossible for the new jury to reach a verdict, the judge will render the acquittal judgment to the defendant.⁹⁴

The interesting point is that unlike English statistics, the Spanish statistics in 1997 showed nearly 70 per cent of Spanish people disliked serving as a juror.⁹⁵ This attitude seems to be triggered by the *Otegi v Spain*,⁹⁶ which resulted in a doubtful acquittal jury verdict of a defendant.⁹⁷ On December 10, 1995, Mikel Otegi, a supporter of the Basque independence movement, killed two police officers. On March 16, 1997, a majority acquittal verdict was given to him by a jury, because the evidence showed that “A combination of his alcoholic intoxication and emotional disturbance-caused by his feeling constantly harassed by the Basque police-had caused him to be in a state of temporary insanity.”⁹⁸ The jurors’ answers to the list of questions and their reasons for the

⁹³ Csere (n 73) 431

⁹⁴ See Article 65 of the Organic Law on the Jury Court (*Ley Organica del Tribunal del Jurado*) 1995

⁹⁵ See Centro de Investigaciones Sociologicas, *Archivos* (1st edition, Centro de Investigaciones Sociologicas, 2007); Roberts and Hough (n 1) 32

⁹⁶ *Otegi v Spain*- 2034/07 ECt HR Judgment 15.3.2011 [Section III], <

⁹⁷ See Roberts and Hough (n 1) 33

⁹⁸ Stephen Thaman, ‘Should criminal juries give reasons for their verdicts?: The Spanish

acquittal verdicts “despite clear evidence of an intentional double murder”⁹⁹ caused suspicion of the appropriateness of the jury verdict among the Spanish public. The Superior Judicial Court of the Basque Country reversed the jury verdict and this reversal was upheld by the Supreme Court.¹⁰⁰ It could be said that the court did not evaluate the jury verdict as a Spanish jury nullification.¹⁰¹

The *Otagi* case has indicated the difficulties of the jury system in Spain, which has a continental inquisitorial criminal justice system. It is understandable since the similar suspicion of the perverse verdict by a jury in the *Otagi* case occurred in common law countries. For example, in Northern Ireland, ethnic sympathies seemed to influence jury verdicts before introducing the Diplock courts in 1973. Therefore, it could be natural that the *Otegi v Spain* “led to calls for the abolition of trial by jury or its conversion into a mixed court” in Spain.¹⁰²

Interestingly, the conviction rate in Spanish jury trials is high: it was 91.15 per cent in 2005.¹⁰³ Perhaps, Spanish juries are more severe than professional judges despite the criticisms against the suspicious acquittal verdicts by the jury at the *Otegi v Spain*.

experience and the implications of the European Court of Human Rights Decision in *Taxquet v Belgium*’ (2011) 86(2) Chicago-Kent Law Review 613, 636

⁹⁹ Thaman (n 74) 251

¹⁰⁰ See Thaman (n 98) 639

¹⁰¹ About the stricter ‘anti-nullification’ approach of the Spanish public, see Thaman (n 74) 251

¹⁰² See Thaman (n 98) 639

¹⁰³ See Mar Jimeno-Bulnes, ‘A different story line for 12 angry men: verdicts reached by majority rule-the Spanish perspective’ (2007) 82 Chicago-Kent Law Review 759, 769

3. Conclusion

As Lloyd-Bostock and Thomas have pointed out, “The English jury may be long established, but its constitutional position leaves it vulnerable.”¹⁰⁴ The absence of specific articles of constitutional statutes for the rights and duties of the jury could be said to be one of the reasons for the flexibility and changeability of the jury system which fits the needs of the society of each age. Meanwhile, this will also be one of the most significant incidences which potentially move the jury system towards its abolition or restriction.

Referring to contemporary criminal justice cases, this thesis predicts that the abolition of the English criminal jury will be a possible realistic judicial choice in the future. The Spanish experience shows that the abolition of the jury system has been realised as possible since in that country doubt over the jury system is voiced more actively than in England.

The main reason for the abolition of the jury would be because perverse jury deliberations and their verdicts have more and more often caused risks of miscarriages of justice. Recent English cases which were noted in this thesis substantiated this situation. Especially, social media use by jury in the age of the Internet is a significant pressure on maintaining the quality of the jury and the right to a fair, efficient and credible criminal trial. Although there have been restrictions which order a jury not to use their mobile phones and research the

¹⁰⁴ Sally Lloyd-Bostock and Cheryl Thomas, ‘Decline of the ‘Little parliament’’ (1999) 62(2) *Law and Contemporary Problems* 7, 53

case in a jury deliberation, and the new Criminal Justice and Courts Act 2015 aims to prevent negative interference in fair and efficient criminal justice by new technology and strengthen the regulations proposing new criminal offences against contempt of court committed by jurors, the court has never been able to monitor whether a juror followed such a direction in his or her home.¹⁰⁵ As Cram has pointed out, “We can be certain that private online research away from the court building will continue.”¹⁰⁶ In addition, it cannot examine whether a juror does or does not talk to his or her family and is therefore implicitly influenced by prejudiced information on a trial.¹⁰⁷ This is a substantial problem.

Davis states that “Removing the jury is seen to be an illiberal act.”¹⁰⁸ This thesis disagrees with that opinion. In the coalition programme of the current Government, there is a sentence which refers to the jury system by suggesting, “We will protect historic freedoms through the defence of trial by jury.”¹⁰⁹ The Government has sought to protect ‘historic freedoms’. In other words, the Government will not necessarily have to avoid the abolition of the jury system if

¹⁰⁵ The Law Commission has realised this concern. See the Law Commission (n 62) 94. This concern has been shared by some researchers, for example, see Caren Morrison, ‘Jury 2.0’ (2011) 62(6) *Hastings Law Journal* 1579, 1610-11

¹⁰⁶ Ian Cram, ‘Dealing with the googling juror: a commentary on Part 3 of the Criminal Justice and Courts Bill’ (2014) 19(4) *Communications Law* 110, 113

¹⁰⁷ According to Hirsch, “Yet even in the most high-profile cases, jurors usually go home at the end of each day.” See Afua Hirsch, ‘Is the internet destroying juries?’ *the Guardian* (London, 26 January 2010) <<http://www.theguardian.com/uk/2010/jan/26/juries-internet-justice>> accessed 8 March 2015

¹⁰⁸ Fergal Davis, ‘The Jury as a Political Institution in an Age of Counterterrorism’ (2013) 33(1) *POLITICS* 5, 15

¹⁰⁹ Prime Minister’s Office, ‘The Coalition: our programme for Government’ (2010) HM Government <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf> accessed 8 March 2015, 11

there are still any tribunals by lay people that reflect ‘historic freedoms.’ If ‘historic freedoms’ cannot be protected by the defence of trial by jury, but be delivered by a new model of English criminal trial which has a lay-element, the Government will not hesitate to facilitate more efficient ways to protect this freedom in order to facilitate fair trial.

If we still kept and expanded the efficient use of the magistrates’ courts system in England, the lay element which is the traditional virtue of the English liberal Criminal Justice system would remain and even be developed. Lloyd-Bostock and Thomas suggested that, “The English criminal justice system is highly unusual in the extent to which it relies on the services of lay judges.”¹¹⁰ As Darbyshire has correctly pointed out, “When you add to magistrates the thousands of lay arbitrators, tribunal panel members and jurors, you start to realise how many important decisions are taken by laypersons in the English legal system.”¹¹¹

This thesis does not insist on the denial of the lay-judge system nor a transition from a traditional adversarial system to an inquisitional one. Instead, it has considered some possible substitute models of the English criminal justice trial process without a jury: English lay-magistrates’ system, judge-only system and inquisitorial mixed jury. Among these tribunal models, the expanding use of a lay-magistrate seems to be a realistic and easy way for the Government and the

¹¹⁰ Sally Lloyd-Bostock and Cheryl Thomas, ‘Decline of the ‘Little parliament’’ (1999) 62(2) Law and Contemporary Problems 7, 61

¹¹¹ Darbyshire (n 4) 13

judiciary to achieve fair and more efficient criminal trials. The thesis also suggests the court must not hesitate to organise a judge-only criminal trial when it is necessary. For instance, if the trial process was contaminated by jury tampering or jurors' misconduct, and if the jury verdict seemed to be a perverse one and a miscarriage of justice, the judge should insist upon a non-jury criminal trial. A prudent attitude toward a legitimate non-jury criminal trial based on Section 44 of the Criminal Justice Act 2003 would be understandable, however, a prudent judge must understand his or her attitude is sometimes unnecessary and possibly harmful for a fair criminal trial.

According to Slapper, "The move to a more representative magistracy has been slow."¹¹² However, statistics show popular use of and an expanding case of categories in magistrates courts. This would be evidence to predict that trial by lay magistrates will be an alternative to jury trial in the future if trial by jury could not eradicate pressure and controversy in cases of jury tampering, complex and fraud cases, and contempt of court in the Internet and social media age. As the Lord Chief Justice indicated in *R v Dallas*, "In the long run any system which allows itself to be treated with contempt faces extinction."¹¹³

Regretfully, there are only a few cases of jury research that seek productive suggestions towards restricting the use of a criminal jury. Most English jury research looks in the same direction of keeping the traditional jury system; therefore there is little diversity in this area.

¹¹² Slapper (n 46) 55

¹¹³ *Attorney General v Dallas* (n 41) at [41]

If it does not mean the denial of lay participation in criminal justice procedure, why will the Government not facilitate the use of magistrates' courts over the controversial contemporary English jury system? This thesis hopes that existing researchers on the English criminal jury system will re-evaluate their close-sightedness and neglect, and consider the possibility of an alternative English judicial model to replace the existing criminal jury system which can be compatible with the significant virtues of a lay judge system; fairness, efficiency and justice.

It could be said that among the roles of the jury system in contemporary England, the eternal significance of the jury system has been to assure fairness of trials.¹¹⁴ There was an age in which the jury was the symbol of democracy and assumed the role of "the lamp that shows that freedom lives."¹¹⁵ Actually, only two per cent of English people asserted the abolition of jury in 2000.¹¹⁶ However, if there is an alternative criminal justice model which achieves fair trials and justice more efficiently than a jury, the new system will be 'the lamp' for English citizens of the future. Needless to say, the unchangeable fire in the lamp is the 'lay element'. Thompson stated that "There is no single, A to Z, exhaustive and scholarly history of the jury, partly because it is a chameleon-like creature, which has altered its colour and shape in differing

¹¹⁴ For example, Ireland takes the same position as this theory. See Sally Ireland, 'Fraud (Trials Without a Jury) Bill Briefing for House of Commons Second Reading' (2006) JUSTICE 3

¹¹⁵ Patrick Devlin, *Trial by Jury* (6th edition, Stevens & Sons Limited, 1978) 164

¹¹⁶ See ICM Research, *State of the Nation Poll 2000: Summary Results* (1st edition, Rowntree Reform Trust, 2000); Roberts and Hough (n 1) 14

contexts.”¹¹⁷ If the wording of ‘history of the jury’ could be changed to ‘history of the criminal trial by lay people’, it would be obvious what the future of the English criminal justice system would look like. Therefore, the lamp that shows that freedom lives will never go out in England.

¹¹⁷ Thompson (n 30)

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